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No. 592

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

SHENANDOAH VALLEY BROADCASTING, INC., ET AL.,

Appellants,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

RALSTONE R. IRVINE
WALTER R. MANSFIELD
2 Wall Street
New York 5, New York

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JURISDICTIONAL STATEMENT

Appellants, operators of 363 domestic television stations, appeal from the Judgment of the United States District Court for the Southern District of New York, entered on October 10, 1962, dismissing appellants' application under Section IX of the Amended Final Judgment herein for licenses to perform musical compositions in the repertory of the American Society of Composers, Authors and Publishers ("ASCAP" herein). Appellants submit this statement to show that the Supreme Court of the United

States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the United States District Court for the Southern District of New York, filed on September 14, 1962, is reported in CCH Trade Regulation Rep., para. 70,466. The amended opinion of the District Court is set out in the separate Appendix filed herewith, at pp. 1a-6a.

JURISDICTION

On February 26, 1941 the United States brought an action in the Southern District of New York against ASCAP under Section 4 of the Act of Congress of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. 4 (the Sherman Act), charging violations of Section 1 of that Act (R. 2-20). On March 4, 1941, by consent of the parties, the District Court entered final judgment (R. 21-28). This judgment was superseded on March 14, 1950 by the Amended Final Judgment herein (set out at pp. 7a-24a of the Appendix), as further amended on and after January 7, 1960 (R. 43-75).

Section VI of the Judgment orders ASCAP "to grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory" (Appendix, p. 14a). Section IX(A) further orders ASCAP, upon receipt of a written application for a license for the right of public performance of ASCAP's repertory, to "advise the applicant in writing of

the fee which it deems reasonable for the license requested," and provides that in the event of disagreement the District Court for the Southern District of New York shall determine the reasonable fee for such license (Appendix, p. 17a).

On October 18, 1961, in anticipation of the expiration on December 31, 1961 of licenses then in effect between ASCAP and appellants, appellants applied to ASCAP pursuant to Sections VI and IX of the Judgment for a license to perform the ASCAP repertory during a five-year period beginning January 1, 1962. Under licenses expiring on December 31, 1961, each appellant had agreed in advance, for the period of that license, to purchase from ASCAP the right to perform its repertory in non-dramatic form on all programs except network and cooperative programs, as defined in the license. Appellants' application of October 18, 1961 sought a new license limited to programs produced by appellants themselves. ASCAP refused to issue the licenses applied for except on the condition that appellants also agree to obtain music rights for prerecorded (filmed and taped) programs furnished to appellants by independent film producers.

On December 19, 1961 appellants filed an application in the District Court under Section IX(A) of the Judgment for the determination of reasonable license fees for the new licenses requested from ASCAP (Appendix, pp. 25a-31a). Appellants' application was supported by the Government, which took the position that if the licenses requested were reasonable, the Court had the power to compel their issuance (Appendix, p. 2a). The Court held that it did not have

the power under the judgment to fix a fee for the type of licenses requested. Its order and judgment dismissing appellants' applications, dated and filed October 10, 1962, are set out in the Appendix at pp. 32a-36a. The notice of appeal to this Court was filed in the District Court on October 23, 1962 (R. 77-95).

The jurisdiction of this Court to review the order on direct appeal is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U. S. C. §29, and is sustained by the decisions of this Court in *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502; *Hughes* v. *United States*, 342 U. S. 353; *United States* v. *California Co-operative Canneries*, 279 U. S. 553; *Sam Fox Publishing Co.* v. *United States*, 366 U. S. 683.

QUESTIONS PRESENTED

1. Did the District Court err in holding that the Amended Final Judgment permits ASCAP to insist that each appellant acquire music performance rights for programs produced by others in order to obtain such rights for programs produced by it?

2. Are appellants entitled under the Amended Final Judgment to the licenses requested by them and to have the District Court fix a reasonable fee therefor?

3. Did the District Court err in refusing to accept and consider evidence offered by appellants showing

(a) that the licenses applied for by appellants

(i) are reasonable and in accord with the normal and customary way of licensing music rights at the

time of the entry of the Amended Final Judgment and since that time;

(ii) are "blanket" and "per program" licenses as those terms are used in the Amended Final Judgment; and

(b) that the type of license offered by ASCAP

(i) perpetuates restraints on competition in the marketing of music rights that the Amended Final Judgment was designed to prevent, and

(ii) restricts and interferes with the right of its members separately to issue public performance licenses to broadcasters, contrary to the provisions of Section IV(B) of the Judgment?

4. Having expressly rejected the parties' respective offers of proof and purporting to reach a decision without making any findings of facts with respect thereto, did the District Court err in making factual findings that appellants' requested licenses are not "blanket" or "per program" licenses, within the meaning of the Amended Final Judgment, as revealed by television broadcasters' past dealings with ASCAP?

STATEMENT

The ASCAP Consent Decree

As originally entered on March 4, 1941 (R. 21-28), the consent judgment against ASCAP did not contain the compulsory licensing provisions of the present decree. It limited itself to enjoining ASCAP from engaging in certain practices in the licensing of its repertory.

The present compulsory licensing provisions were introduced into the decree following the decisions of the District Courts in *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (S. D. N. Y. 1948) and *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948). In *Alden-Rochelle*, a private antitrust suit brought by a group of motion picture theatre operators against ASCAP, and in *M. Witmark*, a copyright infringement action by publisher-members of ASCAP against certain motion picture theatre operators, it was held that despite the 1941 decree ASCAP's operations continued to be in violation of Section 1 of the Sherman Act. The Courts found that ASCAP forced motion picture theatre exhibitors to take film performance licenses from ASCAP by means of various restrictive agreements which barred ASCAP members from licensing the performance rights directly to the film producers, and instead channeled such rights to ASCAP for licensing to the exhibitor. The means found by the Court to have been used to accomplish this result included (1) agreements between motion picture producers and composers under which the composer granted recording rights to the producer (i.e., the right to synchronize a copyrighted musical composition with the film), but expressly excepted the performing rights for joint transfer to ASCAP for licensing to the motion picture exhibitor (80 F. Supp. at 892); (2) film distribution agreements that limited the exhibition of films to theatres having an ASCAP license and prohibited the theatre operator from altering or deleting any part of the film (80 F. Supp. at 844-845, 892); and (3) ASCAP's membership rules which required all license fees obtained by ASCAP members separately to be paid to ASCAP and distributed to the

members according to a formula devised by ASCAP (80 F. Supp. at 846).

On March 14, 1950, following these decisions, the 1941 decree was vacated and the Amended Final Judgment entered, which introduced the compulsory licensing provisions of Section VI and IX, and Section IV(B). Section IV(B) enjoins ASCAP from "limiting, restricting, or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance" (Appendix, p. 10a). Other changes included an injunction against ASCAP's licensing motion picture exhibitors and provisions concerning membership in and management of ASCAP and the distribution of ASCAP fees to its members (Appendix, pp. 10a, 18a-21a). Some of these latter provisions were further amended on January 7, 1960 (see *Sam Fox Publishing Co. v. United States*, 366 U. S. 683, 686-687).

Appellants' License Application

On December 19, 1962, following unsuccessful negotiations with ASCAP, appellants ("petitioners" herein) applied to the District Court pursuant to Sections VI and IX of the Judgment herein for the determination of a reasonable fee on licenses to perform works in the ASCAP repertory for a five-year period commencing on January 1, 1962 (Appendix, pp. 25a-31a).

In their application petitioners requested the Court to fix fees on a license granting the right to perform the ASCAP repertory on programs produced by petitioners themselves. Expressly excluded from the requested license

were network program and prerecorded programs furnished to petitioners by independent film producers (Appendix, pp. 26a-27a).

The precise terms of the licenses requested and petitioners' grounds for seeking that type of license were more fully set out in letters to ASCAP, dated October 18 and November 29, 1961, annexed to petitioners' application (R. 127-136), and in a written offer of proof submitted by petitioners to the Court on April 17, 1962 (Appendix, pp. 37a-175a).

In their offer of proof petitioners pointed out that local television stations have three principal program sources:

> (1) Programs produced by the broadcasters themselves.
>
> (2) Programs furnished to broadcasters by the three national television networks. Television stations with network affiliation devote on the average approximately 62% of their total broadcasting time to the transmission of network programs.
>
> (3) Prerecorded program material furnished to broadcasters by independent film producers. This material consists in large part of theatrical motion picture films, which are offered to television broadcasters after initial exhibition in motion picture theatres, and so-called television "film series." At the present time nearly 68% of local (non-network) programs consist of prerecorded program material, access to which is essential for the successful operation of a commercial television station (Appendix, pp. 39a-41a).

Petitioners' requested licenses, like their existing licenses, would exclude network programs from their cover-

age. Unlike existing licenses, petitioners' requested licenses would also exclude prerecorded programs produced by independent film producers after the date fixed by the Court as the starting date of the new licenses (Appendix, p. 42a).

Petitioners offered to prove that ASCAP refused to issue the licenses requested by petitioners, and insisted upon a renewal of the existing type of license, in order to maintain the prevailing practice of splitting the music "recording" rights (the right to incorporate the score of a copyrighted musical selection into a film or tape) from the television performance rights (Appendix, pp. 63a-64a), so that the recording rights are licensed directly by publishers and composers to film producers, but the television performance right are channeled to ASCAP for licensing by it to broadcasters (Appendix, pp. 53a-54a). Petitioners also submitted proof that ASCAP's existing television licenses are part of a network of restrictive agreements worked out by ASCAP and some of its publisher and composer members to prevent ASCAP composers and publishers from granting television performance rights to film producers simultaneously with recording rights, so that ASCAP would be assured of acquiring them for licensing to broadcasters (Appendix, pp. 55a-63a). These arrangements recently culminated in the execution in 1969 of an agreement between the major film producers and the Composers and Lyricists Guild of America, most of whose members and officers belong to ASCAP, under which each film producer and composer agrees to split the music recording rights from the television performance rights, and to assign the television performance rights to ASCAP (or any

other licensing organization selected by the parties) for licensing to television broadcasters (Appendix, pp. 61a-62a). The intended effect of this, and like, agreements, petitioners offered to show, is to force broadcasters to agree in advance to purchase from ASCAP the performance rights in prerecorded material (Appendix, pp. 63a-64a), and thereby to maintain the license fees paid for such music at a uniform, non-competitive level, instead of permitting the price to be set through bargaining by the film producer, or the broadcaster, with publishers and composers (Appendix, pp. 46a-51a).

These restrictive agreements are implemented by ASCAP's existing "blanket" licenses, which allow broadcasters no credit for rights purchased by the producer from an ASCAP member individually (Appendix, p. 63a).*

As a result of these arrangements, petitioners offered to prove, there has been no instance since the adoption of the existing type of license of a film producer's having acquired television performance rights at the source (Appendix, p. 55a), even though such rights probably could be acquired by the producer at a price much lower than the fees paid by broadcasters (Appendix, pp. 46a-51a). As long as broadcasters are required under existing licenses to agree in advance to buy such rights from ASCAP, producers

* Paragraph 5(H) of ASCAP's "blanket" license provides that:

> "No payment shall be required hereunder with respect to a local commercial television program of LICENSEE presented by motion picture or by transcription if a license has been granted by SOCIETY *(as distinguished from its members)* at the source to perform on such local commercial television program by means of such motion picture or such transcription, as the case may be, the musical compositions embodied therein." (Italics added)

have no incentive to acquire them at the source. Instead, film producers share in the license fees collected by ASCAP under its television licenses through affiliated companies set up by producers to collect the 50% "publisher's" share of ASCAP revenues (Appendix, pp. 54a, 55a-58a).

By excluding prerecorded programs produced after the commencement of the new licenses, the licenses requested by petitioners would lead publishers and composers to negotiate, individually or through ASCAP, with film producers, or broadcasters, for the licensing of performance rights in prerecorded programs (Appendix, p. 64a).

Petitioners further offered proof that the type of license requested by petitioners conforms to the normal and customary way of licensing copyrighted material (excepting only television performance rights) for use in prerecorded programs (Appendix, pp. 44a-46a); that the requested licenses would result in publishers' and composers' receiving payment for copyrighted music commensurate with the great differences in the quality and quantity of such music used in different films (Appendix, pp. 46a-49a); that the requested licenses are reasonable and present no undue difficulties of administration and operation (Appendix, pp. 64a-66a); and that the requested licenses are "blanket" and "per program" licenses as those terms are used in the Judgment herein (Appendix, pp. 66a-68a).

The Dismissal of Petitioners' Application

On September 14, 1962, without having held a hearing for the taking of evidence on petitioners' application and without having considered petitioners' offer of proof (Ap-

pendix, p. 33a), the District Court filed an opinion in which the Court held that it did not have the power under the Amended Final Judgment to entertain petitioners' application because "the type of license sought is neither the blanket nor per program license described in the judgment" (Appendix, p. 1a). The District Court gave petitioners ten days in which to elect to proceed on their petition as one filed for the fixation of fees on a renewal of the existing type of license (Appendix, p. 6a). When no such election was made, the District Court entered an order and judgment dismissing petitioners' application (Appendix, pp. 32a-35a).

The Questions Are Substantial

This appeal presents important and substantial questions relating to the construction of an antitrust consent judgment. The decision of the District Court is the first definitive construction of the compulsory licensing provisions of the Amended Final Judgment herein, which are similar to those found in other Sherman Act decrees. It affects the rights and interests not only of the television broadcasting industry, which pays about $19,000,000 a year to ASCAP for the right to perform its repertory (Appendix, p. 38a), but of all present and prospective commercial users of music who must deal with ASCAP, which is the largest music performance rights licensing organization in the United States. The interpretation given to the provisions of the Judgment will have a significant effect upon the vitality of competition in the marketing of music performance rights in the United States.

1. The District Court's decision, holding that ASCAP may force appellants to take a license covering prerecorded programs produced by others in order to obtain the right to play ASCAP compositions on programs produced by appellants themselves, is contrary to the plain intendment of Sections IV(B), VI and IX of the Judgment herein. The purpose of these sections is to give the user, and not ASCAP, the right to designate the class of programs to be covered by the licenses requested, and to make it impossible for ASCAP to engage in "block-booking" or any other practice that has the effect of limiting or restricting the right of ASCAP members (under Section IV(B)) to deal directly with the user.

Section VI of the Judgment provides that "ASCAP is hereby ordered and directed to grant *to any user making written application therefor* a non-exclusive license to perform all of the compositions in the ASCAP repertory" (Appendix, p. 14a). Appellants, who are music "users," made "written application" to ASCAP on October 18, 1961, for "a non-exclusive license to perform all of the compositions in the ASCAP repertory." Section IX(A) provides that "ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable *for the license requested.*" (Appendix, pp. 16a-17a) and further, that pending the determination of rate proceedings the applicant shall have the right to use any, some or all of the ASCAP compositions "*to which its application pertains*" (Appendix, p. 17a).

The clear purpose of these provisions—to give the music user, not ASCAP, the right to designate the license requested—is confirmed by the history of their adoption, recourse to which may be made in construing the ASCAP consent decree. *Swift & Co.* v. *United States*, 276 U. S. 311 at p. 328; *Standard Oil Co.* v. *Clark*, 163 F. 2d 917, 931 (2d Cir.), certiorari denied, 333 U. S. 873; *United States* v. *Paramount Pictures, Inc.*, 165 F. Supp. 643, 644 (S. D. N. Y.), appeal dismissed, 358 U. S. 28. When the Amended Final Judgment was entered in 1950, the illegality under the antitrust laws of "block-booking" of copyrighted material had recently been settled by this Court in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948), in which this Court held (at pp. 156-159) that it is *per se* unlawful for motion picture distributors to engage in the "block-booking" of copyrighted films by offering to license particular films to exhibitors only on the condition that the exhibitors also take a license for an additional group of films. In *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (S. D. N. Y. 1948), and *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), the District Courts relied heavily on the *Paramount* decision in finding that, despite the 1941 consent decree, ASCAP's licensing practices still violated the Sherman Act (80 F. Supp. at 848, 894-895). The courts condemned various restrictive arrangements which inhibited ASCAP members from granting performance rights to film producers simultaneously with the film recording rights, thereby forcing film exhibitors to take performance licenses from ASCAP covering all films (80 F. Supp. at 892-895). Following these decisions, and in consequence of them, the 1941 decree was vacated and the Amended Final Judgment entered, which introduced into the decree

the compulsory licensing provisions of Section VI and IX. Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 Law & Contemp. Probs. 294, 301 (1954). The holding of the District Court that under the Judgment ASCAP may refuse to grant a license covering programs produced by petitioners themselves unless petitioners also acquire rights for programs produced by independent film producers, without any showing that the licenses requested by petitioners are unreasonable or unworkable, cannot be reconciled either with the language or the history of the compulsory licensing provisions of the Judgment.

The result of the District Court's decision is to permit ASCAP to engage in practices that the courts have repeatedly enjoined as *per se* unlawful under the Sherman Act, a recent instance being afforded by *United States* v. *Loew's, Inc.* (U. S. Sup. Ct., November 5, 1962), where this Court approved so much of the District Court's final order as enjoined defendants from conditioning the licensing of any film to a television station on the licensing of the same, or any other, film to any other television station.

2. Furthermore, the District Court erred in rejecting petitioners' requested license, and dismissing petitioners' application on petitioners' refusal to renew the existing type of license, without considering or holding a hearing on the proof offered by petitioners that ASCAP's existing licenses are unreasonable and do not comply with the provisions of Sections IV(B), VI and IX of the Amended Final Judgment.

The facts adduced by petitioners in their offer of proof demonstrate that by refusing to issue that type of license requested by petitioners, and insisting on a renewal of

the existing type of license, ASCAP is in violation of Section IV(B) of the Judgment, which enjoins ASCAP from "limiting, restricting or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance" (Appendix, p. 10a). Petitioners furnished to the Court detailed and fully documented proof that ASCAP's existing television licenses are part of a network of restrictive agreements worked out by ASCAP and its leading publishers and composers to prevent ASCAP members from granting television performance rights to film producers at the same time that they grant music recording licenses, so as to maintain the prevailing practice of splitting the music recording rights from television performance rights in prerecorded program material, and channeling the latter rights to ASCAP for licensing to stations by ASCAP (Appendix, pp. 55a-63a). These agreements are implemented by ASCAP's existing network and local station "blanket" licenses, which require broadcasters to pay a fee on all prerecorded programs and allow the licensee a credit for programs as to which the producer has already obtained the performance rights only if such rights were obtained by the producer from ASCAP itself and not from an ASCAP member individually (Appendix, p. 63a). By reason of these restrictive arrangements, ASCAP's broadcaster licensees have at no time received a credit under the existing licenses for music cleared at the source on prerecorded programs (Appendix, p. 55a).

The restrictive practices which ASCAP is endeavoring to preserve through its insistence upon a renewal of the existing type of license are precisely the kind of practices that Section IV(B) was meant to avoid. Section IV(B)

was adopted in 1950 following the decisions of the New York and Minnesota District Courts in *Alden-Rochelle*, 80 F. Supp. 888 (S.D. N.Y. 1948), and *M. Witmark*, 80 F. Supp. 843 (D. Minn. 1948) in which various restrictive arrangements between film producers, their ASCAP music publishing affiliates, and composers, in many respects identical with the agreements set forth in petitioners' offer of proof (compare 80 F. Supp. at pp. 892-895 with Appendix, pp. 55a-63a), were condemned on the ground that they inhibited ASCAP members from granting exhibition rights to film producers simultaneously with recording rights, thereby forcing film exhibitors to take out performance licenses from ASCAP.

While in these cases the courts were concerned with the licensing of theatrical motion picture performance rights, not television performance rights, this distinction is not material under Section IV(B). The injunctive provisions of Section IV(B), unlike certain other prohibitions in the 1950 Amended Final Judgment, are not confined to restraints involving theatrical motion picture films but are directed against any limitations or restrictions affecting the right of an ASCAP member to issue performance licenses.

Petitioners' proof shows that by requiring broadcasters to agree in advance to buy all performance rights from it, ASCAP deprives broadcasters of the lower music costs that would result if ASCAP members were free to negotiate directly with the film producers for assignment of television performance licenses simultaneously with the recording and performance rights (Appendix, pp. 46a-51a). In such event composers and publishers, as well as ASCAP, would con-

pete in the furnishing of such rights to producers, many of whom would clear them at the source.

A consent decree, like any other judgment, must be construed so as to give meaning and effect to all of its provisions. *Swift & Co.* v. *United States*, 276 U. S. 311, 328 (1928). If, as petitioners' proof shows, ASCAP violated Section IV(B) by insisting on a renewal of the existing type of license, it seems plain that the District Court erred in ruling that the existing type of license is the only type that ASCAP is obligated to offer to petitioners under the Judgment. On the contrary, the restrictive effect of ASCAP's improper activities, and of the various restrictive arrangements of which the existing licenses are an integral part, can be avoided only through the type of license requested by petitioners, which would exclude prerecorded programs produced after the starting date of the new licenses.

3. The District Court erred in ruling that "the type of license sought is neither the blanket nor per program license described in the judgment" (Appendix, p. 1a). These terms are used in Section VII to describe two alternative methods of computing the fees to be paid by an applicant to ASCAP for a license.* They have nothing to do with

* As the District Court recognized, Section VII "deals primarily with the computation of fees for radio and television broadcasting" (Appendix, p. 5a). Section VII is derived from paragraph II(3) of the 1941 decree, which makes specific provision for "a per program basis of compensation," and requires ASCAP to establish a fair relationship between such "per program basis" and "a basis of compensation which shall not vary in direct proportion either to actual performances during the term of the license of the musical compositions licensed by said defendant for performance or to the number of programs on which musical compositions licensed by defendant shall be performed" (R. 24). The stated purpose of paragraph II(3) was "to afford radio broadcasters alternative basis of license compensation" (R. 25).

the scope of the licenses to be issued by ASCAP. Under Section VII, a "blanket" license is one that requires a broadcaster to pay a fee based on revenues from the entire group of programs covered by the license, including those within the licensed group that use no ASCAP music at all (Appendix, p. 15a). A "per program" license, on the other hand, provides for a license fee based on a fixed amount or percentage of income from each program that actually uses ASCAP music within the license group (Appendix, p. 15a). Section VII (A) of the Judgment prohibits ASCAP from imposing the "blanket" fee basis without the broadcaster's consent, whereas Section VII(B) gives ASCAP the option of charging either a flat fee or a percentage of the broadcaster's income from those licensed programs that play ASCAP music.

Nothing in Section VII restricts the right of a broadcaster to apply for licenses limited to a specific class of programs which constitute less than all of the broadcaster's programming time or material. The broadcaster's right to choose the program group for which he desires a license from ASCAP is no different than the right of any other type of "user," such as a theatre, an orchestra, or a hotel chain, to select the period of time, and the geographical area, to be covered by its license from ASCAP.

The District Court's interpretation of the terms "blanket" and "per program" as used in Section VII is contradicted by the terms of ASCAP's existing television licenses themselves. ASCAP's existing form of "blanket" license does not grant the right to perform the ASCAP repertory on all of petitioners' programs; the license expressly excludes from its coverage network and cooperative programs, as well as dramatic performances of its repertory,

as defined therein (Appendix, p. 67a), with the result that, in the case of the many stations having network affiliation, the license in fact covers only a portion of the station's programming (Appendix, p. 40a). It is a "blanket" license only in the sense that the fee payable to ASCAP is computed on the basis of all programs falling within the program group covered by the license, whether or not they use ASCAP music.

The same is true of ASCAP's existing "per program" license. Whereas Section VII(B) of the Judgment provides that the fee for a "per program" license shall at the option of ASCAP be either a specified amount or a percentage of the sum paid by the sponsor "for each program in which compositions in the ASCAP repertory shall be performed," ASCAP's existing form of "per program" license, which expressly excludes network and cooperative programs, as well as dramatic performances of its repertory, does not require payment of a fee for each program using ASCAP music (Appendix, p. 67a). It is a "per program" license only in the sense that a fee must be paid on all programs within the program group covered by the license.

The licenses requested by petitioners, like the existing licenses, are "blanket" licenses as defined in Section VII since the license fee to be paid to ASCAP will be based on the income from all programs within the licensed group, regardless of the fact that some programs would not use any ASCAP music. In the alternative, petitioners seek a "per program" license as defined in Section VII, whereby they would pay a fee based on income from those programs within the licensed group that actually use ASCAP music

(Appendix, p. 26a, par. 4). The District Court was wrong in concluding that petitioners' requested "blanket" and "per program" licenses do not comply with Section VII.

4. The District Court further erred in adopting as factual findings (Appendix, p. 3a) made in support of its construction of Section VII of the Judgment a large portion of the averments contained in ASCAP's offer of proof (R. 1662-1664) despite the fact that the Court held no hearings for the taking of evidence and had formally rejected both petitioners' and ASCAP's respective offers of proof in reaching its decision (Appendix, p. 33a).

Following oral argument as to the Court's authority to entertain petitioners' application, petitioners and ASCAP simultaneously submitted written offers of proof (Appendix, p. 33a). It was understood that the simultaneous submission of these offers in no way constituted an admission by one party of the accuracy of assertions made in the other's offer, and, in fact, petitioners' offer expressly reserved the right to offer additional proof in support of petitioners' application "or in rebuttal to evidence offered in opposition thereto" (Appendix, p. 37a). No hearings were ever held on these offers of proof, or for the purpose of taking evidence. In its order dismissing petitioners' application, the District Court expressly confirmed that the Court reached its decision "without having considered the offers of proof submitted by the parties and without making any findings of fact with respect thereto" (Appendix, p. 33a). Nevertheless, in its opinion, the District Court went on to make findings with respect to the parties'

past dealings both before and after the entry of the 1950 Amended Final Judgment, largely adopting portions of ASCAP's offer of proof (R. 1032-1034), and drew the conclusion that petitioners' requested licenses are not "blanket" or "per program" licenses within the meaning of the Judgment.

The fact that in the past broadcasters agreed to take the type of license offered by ASCAP would seem to have little, if any, bearing on the question of the petitioners' rights under the Judgment to seek licenses which differ from those heretofore offered by ASCAP, particularly in light of the fact that pre-recorded programs of the type involved here did not become a material factor until recent years (Appendix, pp. 43a-44a). No showing was made that ASCAP and the Government had reference to any particular form of television license in negotiating the 1950 decree, and the Government, in the present proceedings, has expressly repudiated ASCAP's contentions as to the meaning of the compulsory licensing provisions of the decree (Appendix, p. 2a). However, if, as the District Court held, petitioners are to be precluded from seeking the licenses requested by them by reason of their alleged past dealings with ASCAP, a hearing should have been held for the submission and consideration by the Court of all pertinent evidence. The summary manner in which the District Court sought to dispose of this issue was erroneous.

Conclusion

We submit that the District Court committed serious error in dismissing petitioners' application for a license under the compulsory licensing provisions of the Amended Final Judgment and in refusing to grant petitioners a hearing *for* the taking of evidence. We believe that the questions presented by this appeal are substantial and that they are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

RALSTONE R. IRVINE
WALTER R. MANSFIELD
2 Wall Street
New York 5, New York

DONOVAN LEISURE NEWTON & IRVINE
2 Wall Street
New York 5, New York

Office-Supreme Court, U.S.
FILED
NOV
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No. 592

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

SHENANDOAH VALLEY BROADCASTING, INC., ET AL.,

Appellants,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO JURISDICTIONAL STATEMENT

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Opinion of Hon. Sylvester J. Ryan, District Judge. Filed September 14, 1962

[Caption Omitted]

OPINION

RYAN, *J.*

This petition, filed by more than 335 local television stations situated throughout the United States, seeks fixation of a reasonable royalty for a license under Section IX(A) and (B) of the Amended Consent Judgment, entered on March 14, 1950 in the antitrust suit entitled *United States v. ASCAP*. While theoretically the petition is brought under the provisions of the decree for the fixing of fees, what it really seeks from ASCAP is a radically different license from that under which petitioners have been operating under the decree for the past twelve years and only secondly the fixing of a reasonable fee for such license.

The type of license sought is neither the blanket nor per program license described in the judgment. Petitioners would have a composite sort of license, containing a little bit of both, which would grant them the right to use any, some or all of the compositions of ASCAP's repertory on all their locally-originated broadcasts, while excluding from such license music performing rights for network programs and prerecorded material produced after February 28, 1962 by persons other than petitioners; as to those, petitioners would demand that the rights be secured, cleared and paid for at the source.

Petitioners made written application to ASCAP for such license and upon ASCAP's refusal to issue such license, they filed the petition now before us.

Opinion of Hon. Sylvester J. Ryan, District Judge.
Filed September 11, 1962

The underlying and immediate question raised by this petition is the court's power under the decree to compel ASCAP to issue such license; until that is determined the question of a fee under such license is not reached.

It is petitioners' position that the power to fix reasonable fees encompasses the power to fix a type of license which the court finds to be reasonable; that this construction of the decree is justified by the objectives and purposes of the judgment and that consequently no amendment to the decree is necessary in order to grant the application.

The government is in accord with petitioners on the principle that if the court finds the type of license requested to be reasonable, it has the power to compel its issuance; it, however, expresses no opinion on the reasonableness of the license. And it is ASCAP's position that, apart from the express prohibitions and restrictions as to the types of licenses it may not force on an applicant and the affirmative duty it has to offer upon request by an applicant a choice of the types of license enumerated in the judgment, it is free to negotiate with an applicant for a particular kind of license on particular terms, and that, therefore, the court lacks power to direct the issuance of the license sought, irrespective of its reasonableness (which it strenuously disputes).

We agree with the position taken by ASCAP, for the mere fact that a particular license requested may be more reasonable than that which has been given in the past, does not impose upon ASCAP the duty to grant such license,

Opinion of Hon. Sylvester J. Ryan, District Judge, Filed September 14, 1962

nor does it give the court additional powers not contained in the amended judgment.

Until 1949 ASCAP had granted royalty free licenses to all television stations for the use of its repertory; this was in an endeavor to assist the stations and to enable the industry to gain stability. In 1948 ASCAP suggested that the television industry negotiate with it for television licenses. Local and network blanket television licensing agreements were made in 1949, 1954 and 1958; substantially the same provisions were contained in each agreement. The petitioners, all local stations, have operated and continue to operate under a local blanket license granting them the right to play the entire repertory of ASCAP on all locally-originated programs. For this license they pay a fee which is based on a percentage of their "net receipts from sponsors", excluding any transcribed programs which ASCAP licenses at the source. Petitioners, dissatisfied with this type of license, would have the court cast the burden of paying for the performance rights on the pre-recorded programs on the producers rather than on petitioners; a right and option which the producers now have under their decree and which ASCAP is compelled to grant them. ¶ V-B

Nowhere in the judgment is there any provision explicitly or impliedly requiring ASCAP to issue the type of license requested, and petitioners do not so urge. They do argue, however, that the granting of such license would further the objectives of the judgment as a whole whereas a denial would frustrate them, and that looking beyond the

Opinion of Hon. Sylvester J. Ryan, District Judge.
Filed September 14, 1962

exact wording of the decree, as a court of equity must, the power of this court to compel the issuance of the license sought is clear.

More specifically, petitioners in support of their application point to Sections VI and IX as giving this court "broad equitable powers" to grant the type of license they seek.

Section VI provides for the granting of a non-exclusive license to perform "all of the compositions in the ASCAP repertory." While this provision standing alone might lend itself to an interpretation that "all" could encompass a direction to grant licenses on "any or some" as desired by an applicant, when read with the sentence following it and with the other provisions of the judgment, particularly Section VII (B) and (C), it is clear that "all" refers to a license to include the entire repertory as distinguished from the other type of license which is limited to one or more specified compositions. The balance of this Section VI deals with just such a license.

The entire Section IX, which speaks of a fee for the "license requested" following application for a license on "any, some or all" of the compositions, deals with the procedure for determining reasonable license fees, not types of licenses. The words "license requested" do not mean that an applicant for a license is given the right under the decree to compel ASCAP to give any type of license it demands and have this court fix the fee. Each section of the Amended Judgment must be read and interpreted in the light of the entire judgment. (*Swift & Co.* v. *United*

Opinion of Hon. Saboth A. Rifkind, District Judge.
Filed September 14, 1962

States, 276 U. S. 311, 48 S. Ct. 311, 72 L. Ed. 587 (1928). The world-wide license requested does not remove the limitations as to the extent, type and nature of licenses found in the other provisions of the judgment.

In Section IV (E), ASCAP is restrained from negotiating with any motion picture theatre exhibitor for a license to exhibit movies that use its compositions. This section makes no mention of television broadcasters, who are in many respects similarly situated to the theatre exhibitors. It is plain that the television broadcasters were not intended to be included within the prohibitions of Section IV (E).

Section VII deals primarily with the computation of fees for radio and television broadcasting. Section VII (B) provides that ASCAP must issue per-program licenses, on written request, and that the stations be given an economic choice between per-program and blanket licenses—there its obligation ends. There is no mention made of any type of license other than per-program or blanket. Section VIII refers to "the various types of licenses", clearly a *reference to Section VII (B)* and the licenses there described, the economic choice between per-program and blanket licenses, and the fees therefor, and again no other type license is mentioned.

Petitioners urge that the type of license they seek would give greater effect to provisions of the Amended Judgment, which, they argue, is rendered ineffectual by the present type of broadcasting licenses. If this be so (and we make no finding either way), relief could only be

Opinion of Hon. Sylvester J. Ryan, District Judge
Filed September 14, 1962

had by a reappraisal of the Amended Judgment to determine if a further amendment were warranted; this only, after hearings on a petition filed for such relief by a party to the suit.

Petitioners were not parties to the judgment; they have petitioner only as beneficiaries under it and they may not under cover of the protection from discrimination afforded them under its provisions indirectly effect an amendment to that judgment so as to wrest from ASCAP a type of license it is now under no judicial compulsion to grant. Here we do not have a petition for modification of the consent judgment filed by a party to the judgment.

The petition will be entertained if petitioners so elect to proceed within ten (10) days from the date hereof, as one filed for fixation of reasonable fees on a renewal of the type of license that is now and for many years past has been held by them.

Dated New York, September 14th, 1962.

s/ Sylvester J. Ryan
U. S. D. J.

A True Copy
Herbert A. Charlson, Clerk

By Elsie M. Eifer
Deputy Clerk

Amended Final Judgment. United States v. ASCAP. Entered March 14, 1950

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., *Defendants*.	Civil Action No. 13—95 AMENDED FINAL JUDGMENT

Plaintiff having filed its complaint herein on February 26, 1941, the defendants having appeared and filed their answer to the complaint denying the substantive allegations thereof, all parties having consented, without trial or adjudication of any issue of fact or law therein, to the entry of a Civil Decree and Judgment, filed March 4, 1941, and jurisdiction having been retained in this Court pursuant to Section XI of said Civil Decree and Judgment for the purpose of granting such modifications of the Civil Decree and Judgment as may be necessary and appropriate; and

Plaintiff having moved the Court that said Civil Decree and Judgment should be modified in certain respects, and all parties hereto consenting to such modifications and the entry of this Amended Final Judgment,

Amended Final Judgment, United States v. ASCAP, Entered March 14, 1950

NOW, THEREFORE, no testimony having been taken and without trial or adjudication of any issue of fact or law herein and without admission by any defendant in respect of any such issue and upon consent of all parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED that the Civil Decree and Judgment of March 4, 1941 be amended to read as follows:

I. This Court had jurisdiction of the subject matter hereof and of all parties hereto with full power to enter this Judgment. The complaint states a cause of action against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, as amended.

II. As used in this Judgment:

(A) "ASCAP" means the defendant American Society of Composers, Authors and Publishers;

(B) "Right of public performance" means the right to perform a copyrighted musical composition publicly for profit in a non-dramatic manner, sometimes referred to as "small performing right";

(C) "Motion picture performance right" means the right of public performance of music which is recorded in order to be performed in synchronism or timed relation to the exhibition of motion pictures;

Amended Final Judgment, United States v. ASCAP, Entered March 14, 1950

(D) "ASCAP repertory" means those compositions the right of public performance of which ASCAP has or hereafter shall have the right to license or sublicense;

(E) "User" means any person, firm or corporation who or which (1) owns or operates an establishment or enterprise where copyrighted musical compositions are performed publicly for profit, or (2) is otherwise directly engaged in giving public performance of copyrighted musical compositions for profit, or (3) is entitled to obtain a license from ASCAP under Section V of this Judgment.

III. The provisions of this Judgment applicable to the defendant ASCAP shall apply to such defendant, its successors and assigns, and to each of their officers, directors, agents, employees, and to all other persons, including members, acting or claiming to act under, through or for such defendant. None of the injunctions or requirements herein imposed upon the defendants shall apply to the acquisition of or licensing of the right to perform musical compositions publicly for profit outside the United States of America, its territories or possessions, such acquisition or licensing being subject to the provisions of the Final Judgment entered this day in Civil Action No. 42-245.

IV. Defendant ASCAP is hereby enjoined and restrained from:

(A) Holding, acquiring, licensing, enforcing, or negotiating concerning any rights in copyrighted musical com-

positions other than rights of public performance on a non-exclusive basis;

(B) Limiting, restricting, or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance;

(C) Entering into, recognizing, enforcing or claiming any rights under any license for rights of public performance which discriminates in license fees or other terms and conditions between licensees similarly situated;

(D) Hereafter granting any license for rights of public performance in excess of five years' duration, except for motion picture performance rights which are licensed pursuant to Section V (C) of this Judgment;

(E) Granting to, enforcing against, collecting any monies from, or negotiating with any motion picture theatre exhibitor concerning any motion picture performance rights;

(F) Instituting or threatening to institute, or maintaining or continuing any suit or proceeding (1) against any motion picture theatre exhibitor for copyright infringement relating to motion picture performance rights or (2) against any user for copyright infringement of any musical composition not contained in the ASCAP repertory. After the preparation of the list required to be maintained by Section XIV herein, the repertory shall be deemed to consist of only those compositions appearing on such list;

Amended Final Judgment, United States v. ASCAP, Entered March 14, 1950

"(G) Restricting the right of any member to withdraw from membership in ASCAP at the end of any fiscal year upon (1) giving three months' advance written notice to ASCAP, and (2) agreeing that his resignation shall be subject to any rights or obligations existing between ASCAP and its licensees under then existing licenses and to the rights of the withdrawing member accruing under such licenses;

(H) Asserting or exercising any right or power to restrict from public performance for profit by any licensee of ASCAP any composition in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition. Nothing in this Subsection shall be construed to prevent ASCAP, when so directed by the member in interest in respect of a musical composition, from restricting performances of a composition in order reasonably to protect the composition against indiscriminate performances; or the value of the public performance for profit rights therein, or the dramatic performing rights therein, or to prevent ASCAP from restricting performances of a composition so far as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such composition.

V. Defendant ASCAP is hereby ordered and directed to issue, upon request, licenses for rights of public per-

formance of compositions in the ASCAP repertory, as follows:

(A) To a radio broadcasting network, telecasting network or wired music service (as illustrated by the organization known as "Muzak"), on terms which authorize the simultaneous and so-called "delayed" performance by broadcasting or telecasting or simultaneous performances by wired music service, as the case may be, of the ASCAP repertory by any, some or all of the stations in the United States affiliated with such radio network or television network or by all subscriber outlets in the United States affiliated with any wired music service and do not require a separate license for each station or subscriber for such performances;

(B) To a manufacturer, producer or distributor of a transcription or recordation of a composition in ASCAP's repertory which is or shall be recorded for performance on specified commercially sponsored radio programs or television programs, as the case may be, on an electrical transcription or on other specially prepared recordation intended for radio broadcasting or for television broadcasting purposes (or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made) of the right to authorize the broadcasting, by radio or by television, as the case may be, of the recorded composition by means of such transcription or recordation by all radio stations or television stations in the United States enumerated by the licensee, without requiring sepa-

rate licenses for such enumerated stations for such performance;

(C) To any person engaged in producing motion pictures (hereinafter referred to as a "motion picture producer"), so long as ASCAP shall not have divested itself of such rights, a usable license of motion picture performance rights covering the United States, its territories and possessions, without requiring further licenses. Such single license shall be issued in accordance with the following requirements and in accordance with all other provisions of this Judgment not inconsistent therewith:

(1) Such license shall be limited to pictures produced or in production not later than one year after the effective date of the license, and shall not make any charge for any performance occurring prior to the date of this Judgment;

(2) Upon written request of any motion picture producer such license shall be issued on a "per film" basis for the compositions in such film which are in the ASCAP repertory;

(3) All licenses of motion picture performance rights under this Subsection (C) shall be negotiated with and issued to individual motion picture producers, and not on an "industry-wide" basis;

(4) Where within a period of nineteen (19) months prior to the entry of this Judgment a motion picture producer has obtained a license for motion picture performance rights directly from members of ASCAP and has paid

a separately stated amount therefor, such licenses issued by ASCAP covering motion picture performance rights shall, at the request of such producer, include the rights conveyed by the previous license, in which event ASCAP shall allow the motion picture producer a credit against the amount otherwise payable, equal to the amount paid under the previous license;

(5) No writer or publisher member of the Board of Directors of ASCAP shall participate in or vote on any question relating to the negotiation, execution, performance or enforcement of any such license where such member at the time, directly or indirectly, has any pecuniary interest in any motion picture producer, in any subsidiary or affiliate of any motion picture producer, or in any contractual relationship with any such producer.

VI. Defendant ASCAP is hereby ordered and directed to grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory. Defendant ASCAP shall not grant to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member or members in interest shall have requested ASCAP in writing so to do, or unless ASCAP, at the written request of the prospective user shall have sent a written notice of the prospective user's request for a license to each such member at his last known address, and such member shall have failed to reply within thirty (30) days thereafter.

Amended Final Judgment, United States v. ASCAP, Entered March 14, 1950

VII. Defendant ASCAP, in licensing rights for public performance for radio broadcasting and telecasting, is hereby:

(A) Enjoined and restrained from issuing any license, the fee for which

(1) in the case of commercial programs, is based upon a percentage of the income received by the licensee from programs which include no compositions in the ASCAP repertory, or

(2) in the case of sustaining programs, does not vary in proportion either (a) to the performance of composition in the ASCAP repertory during the term of the license, or (b) to the number of programs on which such compositions or any of them are performed,

unless the radio broadcaster or telecaster to whom such license shall be issued shall desire a license on either or both of such bases;

(B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses, the fee for which

(1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,

(2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in connection with such program if it had been commercial, and

(3) subject to the other provisions of Section VIII, takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs, with the objective that such stations shall have a genuine economic choice between per program and blanket licenses;

(C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license.

VIII. Defendant ASCAP, in fixing its fees for the licensing of compositions in the ASCAP repertory, is hereby ordered and directed to use its best efforts to avoid any discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various types of licenses.

IX. (A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the

ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Subsection (B) hereof, and to the final order of judgment entered by this Court in such proceeding;

(B) When an applicant has the right to perform any compositions in the ASCAP repertory pending the completion of any negotiations or proceedings provided for in Subsection (A) hereof, either the applicant or ASCAP may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. If the Court fixes such interim fee, ASCAP shall then issue and the applicant shall accept a license providing for the payment of a fee at such interim rate from the date of the filing of such application for an interim fee. If the applicant fails to accept such license or fails to pay the interim fee in accordance therewith, such failure shall be ground

for the dismissal of his application. Where an interim license has been issued pursuant to this Subsection (B), the reasonable fee finally determined by this Court shall be retroactive to the date the applicant acquired the right to use any, some or all of the compositions in the ASCAP repertory pursuant to the provisions of this Section IX;

(C) When a reasonable fee has been finally determined by this Court, defendant ASCAP shall be required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of ASCAP, but any license agreement which has been executed without any Court intervention between ASCAP and another user similarly situated prior to such determination by the Court shall not be deemed to be in any way affected or altered by such determination for the term of such license agreement;

(D) Nothing in this Section IX shall prevent any applicant or licensee from attacking in the aforesaid proceedings or in any other controversy the validity of the copyright of any of the compositions in the ASCAP repertory nor shall this Judgment be construed as importing any validity or value to any of said copyrights.

X. No officer or director of ASCAP, or any person acting on its behalf, shall participate in or vote on any question relating to any transaction or negotiation involving ASCAP and a licensee, or prospective licensee, where such officer, director, or other person has any pecuniary interest in such licensee or prospective licensee, or in any subsidi-

any or affiliate thereof, or in any contractual relationship with any such licensee or prospective licensee.

XI. Defendant ASCAP is hereby ordered and directed to distribute to its members the monies received by licensing rights of public performance on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically made by or for ASCAP.

XII. Defendant ASCAP is hereby ordered and directed, within three months after the entry of this Judgment, to provide in its Articles of Association, effective as of the date of this Judgment, that ASCAP's members be prohibited from:

(A) At any time, while a member of ASCAP or thereafter, instituting, or threatening to institute, or maintaining or continuing any suit or proceeding for acts of copyright infringement relating to motion picture performance rights (1) alleged to have occurred prior to the date of this Judgment, or (2) where corresponding synchronization rights have been granted prior to the date of this Judgment;

(B) While a member of ASCAP, granting a synchronization or recording right for any musical composition to any motion picture producer unless the member or members in interest or ASCAP grants corresponding motion picture performance rights in conformity with the provisions of this Judgment.

Amended Final Judgment, United States v. ASCAP, Entered March 14, 1950

XIII. In order to insure a democratic administration of the affairs of defendant ASCAP, and to assure its members an opportunity to protect their rights through fair and impartial hearings based on adequate information, defendant ASCAP is hereby ordered and directed to provide in its Articles of Association:

(A) That the members of the Board of Directors shall be elected by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the Board of Directors. Due weight may be given to the classification of the member within ASCAP in determining the number of votes each member may cast for the election of directors. Elections for the entire membership of the Board of Directors shall take place annually or every two years. The Board of Directors shall, as far as practicable, give representation to writer members and publisher members with different participations in ASCAP's revenue distributions;

(B) That the general basis of member classification for voting and revenue distribution purposes shall be set forth in writing and shall be made available to any member upon request;

(C) That any member may appeal from the final determination of his classification by any ASCAP committee or board to an impartial arbiter or panel;

(D) That records be maintained by the officers, committees, or boards of ASCAP, and the impartial arbiters or panels referred to in Subsection (C) of this Section dealing with the classification of members and distribution of reve-

tive, which will adequately apprise the respective members of the determinations made and actions taken by such officers, committees and boards of ASCAP, and arbiters or panels as to such members and the basis therefor.

XIV. Immediately following entry of this Judgment, defendant ASCAP shall upon written request from any prospective user inform such user whether any compositions specified in such request are in the ASCAP repertory, and make available for public inspection such information as to the ASCAP repertory as it has. Defendant ASCAP is furthermore ordered and directed to prepare, within two years, and to maintain and keep current and make available for inspection during regular office hours, a list of all musical compositions in the ASCAP repertory, which list will show the title, date of copyright and the author, composer and current publisher of each composition.

XV. Defendant ASCAP is hereby ordered and directed to admit to membership, not participations or otherwise,

(A) Any composer or author of a copyrighted musical composition who shall have had at least one work of his composition or writing regularly published;

(B) Any person, firm, corporation or partnership actively engaged in the music publishing business, whose musical publications have been issued or distributed on a commercial scale for at least one year, and who assumes the financial risk involved in the normal publication of musical works.

Amended Final Judgment, United States v. ASCAP, Entered March 14, 1950

XVI. For the purpose of securing compliance with this Amended Final Judgment, duly authorized representatives of the Department of Justice shall upon the written request of the Attorney General or an Assistant Attorney General, and on reasonable notice to defendant, be permitted (a) reasonable access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Amended Final Judgment; (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters; and said defendant, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this Judgment, provided, however, that information received by the means permitted in this Section XVI shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States is a party or as otherwise required by law.

XVII. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Amended Final Judgment to make application to the Court for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out

of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

It is expressly understood, in addition to the foregoing, that the plaintiff may, upon reasonable notice, at any time after five (5) years from the date of entry of this Amended Final Judgment apply to this Court for the vacation of said Judgment, or its modification in any respect, including the dissolution of ASCAP (and any time within two (2) years from said date apply to this Court for the vacation or modification of Section V (C) hereof). During the applicable periods specified above, defendant ASCAP is hereby ordered and directed to conduct its affairs, including the making of agreements to acquire or license the rights of public performance, so as not unreasonably to complicate or delay the enforcement of any such further relief requested by plaintiff and granted by this Court pursuant to the terms of this Section.

XVIII. This Amended Final Judgment shall become effective from the date of entry hereof, except that the provisions of Sections IV (G), XIII and XV shall become effective three months after the date of entry hereof, and the provisions of Section XI shall become effective eight months after the date of entry hereof. This Amended Final Judgment supersedes the Civil Decree and Judgment entered herein on March 4, 1941, but shall not be construed to make proper or lawful or sanction any acts which occurred prior to the date hereof which were enjoined, restrained or prohibited by said Civil Decree and Judgment of March 4, 1941.

Amended Final Judgment, United States v. ASCAP. Entered March 14, 1950

Approved:

March 14, 1950

HENRY W. GODDARD
United States District Judge

We hereby consent to the entry of the foregoing Judgment.

For the plaintiff

SIGMUND TIMBERG
Special Assistant to the
Attorney General
WILLIAM D. KILGORE, JR.
HAROLD LASSER
Special Attorneys

HERBERT A. BERGSON
Assistant Attorney General
MELVILLE C. WILLIAMS
Special Assistant to the
Attorney General
IRVING H. SAYPOL
United States Attorney

For the Defendants

ROBERT P. PATTERSON
HERMAN FINKELSTEIN
OSCAR COX
Schwartz & Frohlich
By LOUIS D. FROHLICH

Judgment entered:

WILLIAM V. CONNELL
Clerk

March 14, 1950

Petition of Shenandoah Valley Broadcasting, Inc., et al., Dated December 18, 1961

To the Honorable Judges of the United States District Court for the Southern District of New York:

The petition of Shenandoah Valley Broadcasting, Inc., et al., respectfully alleges:

1. Each of the petitioners listed in Exhibit A attached hereto is a corporation engaged in operating a television broadcasting station or stations known by the call letters, and situated in the areas, indicated opposite its name in Exhibit A.

2. The amended final judgment in *United States* v. *American Society of Composers, Authors and Publishers*, Civil Action No. 13-95, provides in paragraph IX(A) thereof that:

> "Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee . . . Pending the completion of any such negotiations or proceedings, the applicant shall have the

* Omitted from this Appendix

right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Subsection (B) hereof, and to the final order or judgment entered by this Court in such proceeding."

3. Paragraph IX(B) of the amended final judgment further provides in part that:

"... either the applicant or ASCAP may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. If the Court fixes such interim fee, ASCAP shall then issue and the applicant shall accept a license providing for the payment of a fee at such interim rate from the date of the filing of such application for interim fee. ..."

4. On or about October 18, 1961, petitioners made written application to ASCAP for blanket and per program licenses giving each petitioner, beginning on January 1, 1962, and continuing through December 31, 1966, the right to use any, some, or all of the compositions in the ASCAP repertory in all of petitioners' public television broadcasts, excepting only:

(a) network programs; and

(b) programs consisting of pre-recorded (filmed or taped) material which is produced hereafter by persons other than petitioner (e.g., theatrical motion picture films

of syndicated TV film episodes), for which the producer normally acquires recording rights at the time the film is produced.

In order to give producers of new filmed or taped material a reasonable opportunity to clear performance rights at the source, and to avoid any prejudice to producers who have partly completed programs without clearing performance rights, petitioners, by letter of November 29, 1961, advised ASCAP that the pre-recorded programs to be excluded from the license would be limited to material produced after February 28, 1962.

5. Petitioners and ASCAP have been unable to agree upon a reasonable fee for the licenses requested herein within sixty (60) days of petitioners' application. A copy of petitioners' application of October 18, 1961, to ASCAP, as further defined by letter of November 29, 1961, is attached hereto as exhibit B.* In order to simplify the issues, the petitioners, for purposes only of fixing an *interim* fee to be paid for the rights requested, are willing to accept a license with the limitations cited in Paragraphs 4(a) and (b) above, but otherwise adhering to the forms of license now in effect between them and ASCAP without the clarifications and amendments of such forms of license contained in Schedule A and B to their application of October 18, 1961. This request is made without prejudice to petition-

* Omitted from this Appendix.

ers' rights, upon the final determination of the reasonable fee to be paid, to obtain such clarifications and amendments.

WHEREFORE, petitioners respectfully apply to this Court at the foot of the ASCAP final judgment, on behalf of themselves and all others similarly situated who may join this application and contribute to the expenses thereof, for an order

(a) determining the reasonable and non-discriminatory fees to be paid for the blanket and per program licenses requested herein;

(b) fixing the interim fee to be paid by petitioners for the rights requested in ASCAP's existing repertory at 75% of the rate payable under licenses expiring on December 31, 1961, and in the case of the blanket license sustaining fee, an amount per sustaining program no greater than the station would pay on a commercial program broadcast during the same time period, subject to a monthly maximum equal to 75% of the station's highest quarter-hour card rate, the said rate to be decreased in proportion to any decrease of more than 10% in the existing repertory (as measured by the total amount of ASCAP's distribution of royalties during the preceding calendar year), without prejudice to petitioners' rights, upon a proper showing, to an order establishing reasonable and non-discriminatory fees at lower or different levels;

(c) directing ASCAP to execute and issue to each petitioner an interim license granting the rights requested,

providing for a payment of a fee at the interim rate fixed by this Court from January 1, 1962, until the date when a final order establishing a reasonable fee is entered, and upon acceptance of such license by petitioners, or any of them, to submit a true copy to each of ASCAP's composer and publisher members, advising that the license has been executed pursuant to this order;

(d) in order to prevent frustration or circumvention of Paragraph IX of the amended final judgment herein, and the foregoing orders thereunder,

(i) setting aside the resolution contained in ASCAP's letter of August 4, 1961, to its members to the effect that authorizations received by ASCAP from its members to license television performing rights owned and controlled by members will be held in escrow by the President of ASCAP;

(ii) enjoining ASCAP and its Board of Directors from refusing to exercise the authorizations received by ASCAP from its members to issue television performance licenses;

(iii) enjoining ASCAP, its Board of Directors and any member who has executed and delivered such authorization to ASCAP from threatening or instituting any proceedings against petitioners for copyright infringement by reason of the public performance by petitioners on television of any compositions covered by such authorization;

(iv) directing ASCAP forthwith to furnish to petitioners a list of the composer and publisher members who have authorized ASCAP, conditionally or otherwise, to issue television performance licenses for the period beginning January 1, 1962, and showing the percentage of ASCAP's existing repertory (as measured by the total amount of ASCAP's distribution of royalties during the preceding calendar year) represented by such authorizations; and

(v) enjoining ASCAP, its Board of Directors, and its members from enforcing or adhering to any condition devised, created, or imposed by ASCAP or its Board of Directors which discourages or prevents composer or publisher members from authorizing ASCAP to license to petitioners the rights requested herein, and further enjoining ASCAP, its Board of Directors and its members from in any way discouraging or preventing composer or publisher members from authorizing ASCAP on their behalf to license to petitioners the rights requested herein; and

(vi) enjoining ASCAP, its Board of Directors and members from withdrawing, or purporting to withdraw any television performance rights presently contained in the ASCAP repertory and limiting, restricting, or interfering with the television performance by petitioners of any, some, or all of the compositions presently in the ASCAP repertory;

(e) fixing the time for service and filing of ASCAP's answer to this petition and for service and filing of affidavits in reply thereto by petitioners; and

(f) granting such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
December 18, 1961.

DONOVAN LEISURE NEWTON & IRVINE
Attorneys for Petitioners
No. 2 Wall Street
New York 5, N. Y.

Order of the United States District Court for the Southern District of New York, Filed October 10, 1962

Petitioners Shenandoah Valley Broadcasting, Inc., et al., constituting all of the local television stations which are petitioners herein other than network owned and operated stations (hereinafter collectively referred to as "Shenandoah Valley Broadcasting, Inc., et al.") having applied to this Court on December 19, 1961 for an order under the Final Amended Judgment herein determining fees to be paid to respondent American Society of Composers, Authors and Publishers for the type of licenses requested by said petitioners, and

Respondent having filed its answer denying that the Court is authorized by the Amended Final Judgment to determine fees for the type of licenses requested by said petitioners, and

Petitioners Columbia Broadcasting System, Inc., National Broadcasting Company, Inc., and American Broadcasting-Paramount Theatres, Inc., and WXYZ, Inc., having filed applications for the determination of reasonable license fees for their television networks and the television stations owned and operated by such petitioners, and

By its order of March 5, 1962, this Court having consolidated all of the foregoing applications, and

The Court having ordered the respondent to issue interim licenses to all of the petitioners upon the same terms

Order of the United States District Court for the Southern District of New York, Filed October 10, 1962

as are set forth in the agreements in effect between the respective petitioners and respondent prior to January 1, 1962, and

The Court having heard argument as to the authority of the Court under the Amended Final Judgment to determine fees for the type of licenses requested by petitioners Shenandoah Valley Broadcasting, Inc., et al., and having permitted said petitioners and respondent to submit respective proposed offers of proof, which offers of proof were submitted to the Court on April 17, 1962, and

The Court having reached a decision without having considered the offers of proof submitted by the parties and without making any findings of fact with respect thereto, and

The Court having filed its opinion on September 14, 1962, finding that it is not authorized under the Amended Final Judgment to determine fees for the type of licenses for which petitioners Shenandoah Valley Broadcasting, Inc., et al., have applied, and

The Court having given petitioners Shenandoah Valley Broadcasting, Inc., et al., ten (10) days thereafter to elect to have their petition treated as filed for the determination of fees on the types of licenses heretofore in effect between petitioners and ASCAP, and no such election having been made by petitioners, and

Order of the United States District Court for the Southern District of New York, Filed October 10, 1962

Petitioners Shenandoah Valley Broadcasting, Inc., et al., having moved the Court for an order vacating as to them the March 5, 1962 order of consolidation, and severing the application of said petitioners from the remaining consolidated applications, and the Court having heard argument thereon; it is

ORDERED that the application of petitioners Shenandoah Valley Broadcasting, Inc., et al., be and hereby is severed from the consolidated applications and that it be treated henceforth as a separate proceeding under the following caption:

UNITED STATES OF AMERICA,

Plaintiff,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Defendant-Respondent.

Order of the United States District Court for the Southern District of New York, Filed October 10, 1962

In the Matter of the Application

of

SHENANDOAH VALLEY BROADCASTING, INC. et al.,

Petitioners,

For the Determination of Reasonable License Fees.

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and it is

FURTHER ORDERED that there being no just reason for delay, the Clerk of the Court is directed to enter final judgment dismissing the application of petitioners Shenandoah Valley Broadcasting, Inc., et al.

SYLVESTER J. RYAN
U. S. D. J.

Dated: New York, N. Y.
October 10th, 1962

Judgment of the United States District Court for the Southern District of New York, Filed October 10, 1962

The Honorable Sylvester J. Ryan, in an order dated and filed October 10, 1962, having severed the application of Shenandoah Valley Broadcasting, Inc. to be treated under the above caption; determined there being no just reason for delay and directed entry of final judgment dismissing the application of petitioners Shenandoah Valley Broadcasting, Inc., et al.; it is

ADJUDGED: The respondent American Society of Composers, Authors and Publishers have judgment against the petitioners Shenandoah Valley Broadcasting, Inc., et al. dismissing their application.

Dated: New York, N. Y.
October 10, 1962.

HERBERT A. CHARLSON,
Clerk.

Petitioners' Offer of Proof, Filed April 17, 1962

Petitioners make the following offer of proof on the issue of petitioners' right under the Amended Final Judgment herein to obtain the local station television performance licenses for which petitioners have applied to the American Society of Composers, Authors and Publishers (hereinafter called "ASCAP") and to this Court. This offer is made without prejudice to petitioners' right, upon a hearing in this proceeding, to offer additional proof in support of petitioners' application or in rebuttal to evidence offered in opposition thereto.

I.

OFFER OF PROOF OF BACKGROUND FACTS RELATING TO PETITIONERS' PROPOSED LICENSES.

1. As of April 17, 1962 the petitioners herein represented 359 commercial television stations, operating under a license or construction permit from the Federal Communications Commission. Petitioners represent over 65% of the commercial television stations in operation in the United States as of January 1, 1962.

2. ASCAP is an unincorporated membership association of composers, authors and publishers organized and existing under the laws of the State of New York, having its principal office and place for doing business at 575 Madison Avenue, New York City. ASCAP was organized in 1914 by publishers, composers and authors of copy-

righted musical compositions for a period of 99 years from the date of its organization. Since its organization, ASCAP has been engaged in the business of issuing licenses for the right to perform publicly for profit copyrighted musical compositions in ASCAP's repertory.

3. ASCAP's present membership includes several thousand composers, authors and publishers who collectively own or control many hundreds of thousands of copyrighted musical works. ASCAP's members, and others including foreign performing rights societies, have authorized ASCAP to issue licenses for the right to perform these works publicly for profit. Such works appear widely on phonograph records, on sheet music and in theatrical motion picture and television films. In order for petitioners to operate their stations profitably and successfully it is essential that petitioners have the right to perform compositions in the ASCAP repertory on programs produced by petitioners locally and on filmed or taped program material furnished to petitioners by others.

4. In 1961 ASCAP earned approximately $33,000,000 from all sources of revenue, of which about $19,000,000 was paid by television broadcasters and networks. Subject to certain deductions for distributions to foreign performing rights societies, administrative costs and expenses and contingencies, ASCAP distributes to its members all revenues derived by ASCAP through its performance licenses, one-half of such distributive share going to author and

composer members and the other half to publisher members.

5. Local television broadcasters have three principal sources for television program material:

(a) Programs furnished to local stations by the three national television networks;

(b) Programs produced locally by or on behalf of a broadcaster, which are either "live" (i.e., transmitted directly from the television camera to the viewer) or recorded locally on motion picture film or video tape; and

(c) Pre-recorded program material sold or licensed to broadcasters by independent producers or distributors, which consists for the most part of motion picture films produced initially for theatre exhibition, of television film series* and of other films or video tapes produced primarily

* A "television film series" consists of a group of separate self-contained films, commonly known as "episodes," produced for initial television presentation on a television network or local station. The episodes of a series are each of approximately the same length and either involve a continuity of theme, situation or principal characters or are comprised of unrelated dramatic presentations commonly known as "anthologies." A film series commonly consists of 13, 26, 39 or more episodes, and in some instances may exceed a hundred separate episodes. In many instances a series is produced for presentation as a half-hour television program, and in some instances for presentation as a five, ten or fifteen minute program or as a one hour program. Some television film series have been produced by the television networks. The large majority have been, and are, produced by independent organizations which sell or lease their films to the television networks and local stations.

for television showing. In addition, broadcasters receive some filmed material from agencies of federal, state, and local governments, educational institutions and groups, charitable organizations and other sources.

6. Filmed material produced by others than the broadcaster constitutes a substantial portion of local (non-network) television programming.

As determined by a recent industry-wide survey, in 1961 television stations with network affiliations devoted on the average approximately 68% of their local (non-network) programs* to filmed and taped programs (only a small amount of which represents programs recorded locally by the broadcaster) as follows:

(a) Films made for initial motion picture theatre exhibition	34%
(b) Television film series and other television films	32%
(c) Syndicated video tape shows	2%
Total percentage of local broadcasting time devoted to the foregoing prerecorded programs	68%

* In 1961 television stations with network affiliations devoted on the average approximately 62% of their total broadcasting time to network programs and 38% to local (non-network) programs.

Petitioners' Offer of Proof, Filed April 17, 1962

Television stations without network affiliation devoted in 1961 approximately 71% of their total broadcasting time to filmed and taped programs, as follows:

(a) Films made for initial motion picture theatre exhibition	27%
(b) Television film series and other television films	39%
(c) Syndicated video tape shows	5%
Total percentage of local broadcasting time devoted to the foregoing prerecorded programs	71%

7. The use by television stations of prerecorded filmed or taped program material furnished by independent producers and distributors is essential to their profitable operation. Such prerecorded programs contain material which cannot be reproduced by the broadcaster (e.g., outdoor adventure shows, sports programs, nature and wild life programs, travel programs) and in many instances present entertainers who would not otherwise be available. In most instances it would not be physically or financially possible for local television stations to attempt to duplicate such prerecorded program material on a "live" basis. It is essential for broadcasters to have the right to perform works in the ASCAP repertory in order to exhibit the numerous films containing one or more of such works.

Petitioners' Offer of Proof, Filed April 17, 1962

8. The scope of the licenses which petitioners seek in the within proceeding differs from the scope of ASCAP's existing local station licenses in that petitioners' proposed licenses would:

(a) Exclude prerecorded program material sold, licensed, or otherwise furnished to broadcasters by independent producers or distributors and whose production is commenced after February 28, 1962, or such other date as may be fixed by the Court for the commencement of petitioners' licenses;

(b) Include "cooperative programs" (as defined in paragraph 5(F) of the existing local station blanket licenses and 4(F) of the existing local station per program licenses), which are excluded from the coverage of ASCAP's existing local station licenses.

9. The scope of the licenses which petitioners here seek would remain the same as ASCAP's existing local station licenses in the following respects:

(a) They would exclude programs furnished to local stations by a television network.

(b) They would include programs produced locally by or on behalf of a broadcaster to the extent that such programs are covered by ASCAP's existing local station licenses. Petitioners include such programs within the scope of their proposed licenses because it would be commercially impossible for broadcasters to negotiate sepa-

rately with each member of ASCAP for music performance rights.

(c) They would include prerecorded program material sold, licensed or otherwise furnished to broadcasters by independent producers or distributors, which are produced, or whose production is commenced, prior to February 28, 1962, or such other date as may be fixed by the Court, to the same extent that such programs are covered by ASCAP's existing local station licenses. Petitioners include such existing prerecorded program material because, for the reasons stated hereinafter, the producers and distributors thereof have not heretofore acquired television performance rights with respect to ASCAP music incorporated therein, and in many cases it would be difficult or impossible for such a producer or distributor now to bargain for and obtain the necessary television performance rights.

10. When the terms of the existing local station licenses were originally negotiated in and prior to 1953, the production of television films was conducted on a relatively minor scale, and post-1948 theatrical motion picture films were not generally available for exhibition by television broadcasters. At the present time, television film series constitute a large portion of the prerecorded material exhibited by broadcasters, and since 1960, following an agreement between the domestic motion picture industry and various talent guilds for the general release to television of post-1948 theatrical motion pictures, current theatrical motion

pictures have become available to broadcasters in increasing numbers.

II.

OFFER OF FACTS TO PROVE THAT PETITIONERS' PROPOSED LICENSES CONFORM TO THE NORMAL AND CUSTOMARY WAY OF LICENSING MUSIC RIGHTS.

1. Producers of theatrical motion pictures, television film series and other television films commonly obtain music for use in such films either by engaging a composer to produce an original score, or by obtaining a license from a music publishing firm for the right to use an existing copyrighted musical work, or by obtaining recordings from the various companies, commonly known as sound track libraries, which maintain selections of pre-recorded music for use as background and incidental music in films. The common practice in the production of theatrical motion picture films and television films series is for the producer to engage a composer to create an original musical score and to incorporate into that score brief selections drawn from existing works owned by music publishing firms or furnished by sound track libraries. At present, several hundred composers are engaged in writing such film music, and these writers constitute the major source of music for films currently in production.

2. Excepting only television performance rights, the film producer normally makes all of the necessary arrange-

ments with the respective composers or other copyright owners to enable such film to be performed publicly for profit. The producer obtains a music recording, or synchronization, license (see Exhibits 1 and 3 annexed hereto). Where the films is intended for exhibition in theatrical motion picture houses, the producer obtains the motion picture theatre performance rights (see Exhibits 1 and 3 annexed hereto). Where the film contains "dramatic" music excluded from ASCAP's existing television performance licenses, the producer, when dealing with ASCAP members, also obtains a "dramatic" music license.

3. When dealing with composers or other copyright owners who are not members of any performing rights organization, or who have not licensed or assigned their works to such an organization, the film producer commonly obtains, in addition to the recording and other rights referred to above, the necessary television performance rights.

4. With respect to pre-recorded commercial announcements containing music in the form of "jingles" or background music, the film producer commonly obtains all necessary television performance rights from the composer or copyright owner, and such music commonly is not licensed to TV stations through any performing rights organization.

5. With respect to copyrighted literary material, the common practice is for film producers to make arrange-

ments with the author or other copyright owner for all necessary recording and performance licenses, including the television performance rights. Broadcasters exhibiting the films do not take out any additional or separate license for the right to perform such copyrighted literary material.

III.

OFFER OF FACTS TO PROVE THAT THERE ARE SUBSTANTIAL DIFFERENCES IN THE QUANTITY AND QUALITY OF THE MUSIC USED IN DIFFERENT FILMS, AND THAT THE FAIR AND REASONABLE VALUE OF THIS MUSIC CANNOT BE DETERMINED EXCEPT THROUGH NEGOTIATIONS CONDUCTED AT THE TIME THE MUSIC USED IN THE FILM IS SELECTED BY THE FILM PRODUCER.

1. There exist substantial variations among different theatrical motion pictures and television films with respect to (a) the number of composers whose musical works are, in whole or in part, represented in the film; (b) the number of different selections used, in whole or in part, in the film; (c) the popularity of the musical selections used in the film and the professional reputation of their respective composers; (d) the type of use made of the music in the film, e.g., feature use in the form of vocal or instrumental rendition, use as theme music, and use as background, cue or bridge music; and the amount of film playing time with musical accompaniment; and (e) the types of music used in films, some of such different types being colloquially

known as "classical" music, "semi-classical" music, "popular" music, and other current musical forms such as "country and Western" music, "rhythm and blues" and "rock 'n roll".

2. Only the film producer is in a position to determine his musical needs for each film, which vary substantially both as to the quality and quantity of music required from film to film.

3. The music rights which the film producer normally acquires are far more limited in scope than the rights which television stations must take under ASCAP's existing television performance licenses. When licensing the music recording rights and motion picture theatre performance rights to film producers, music publishers commonly define (a) the type of use that may be made of the music in the film; (b) the amount of use, e.g., the number of separate occasions that the music may be played in the film, the total permitted playing time, etc.; (c) the method of exhibition, e.g., whether the film is to be exhibited in motion picture theatre houses, on television networks and local stations, or on "closed circuit" or "subscription or pay" television; (d) the geographic areas covered by the license; and (e) the term of the license.

4. The prices which film producers pay to composers and other copyright owners for the music recording rights, the right to make "dramatic" use of music, and motion

picture theatre performance rights are commonly arrived at through negotiation between the parties and vary substantially, depending on the relative merits of the different compositions involved, the reputation of their respective composers, the use made of the music in the film, and many other factors.

5. The compensation received by composers engaged by film producers is commonly determined through negotiations between the producer and the composer. While in many instances the existing collective bargaining agreement between the major film producers and members of the Composers and Lyricists Guild (Exhibit 3 annexed hereto) places a floor under the compensation to be paid to composers, composers often seek compensation over and above the prescribed minimum, or seek types of compensation (e.g., a fee based on the number of minutes of music composed) not provided for in the collective bargaining agreement, and their compensation, as finally agreed upon, varies greatly depending upon the reputation of the composer, the amount of music in the film, and many other factors.

6. When negotiating with film producers for the right to use existing compositions, music publishers and their licensing agents commonly require the film producer to furnish detailed information as to the projected use of the composition, including information as to whether the producer plans to give the composition a vocal or instrumental

rendition, whether the work will be used as feature music or as background and incidental music, and the number and maximum length of performances of the music in the film. Upon receiving the requested information concerning the intended use of the music sought, the publisher or his agent commonly quotes a fee to the producer. The producer thereafter may accept or reject the quoted fee, or seek a lower fee. On occasion the producer may solicit quotations from several different publishers and make his selection after receiving their respective bids.

7. Sound track libraries generally make their respective catalogues available at published card rates. The amount of the fee commonly depends upon the number of selections used by the film producer, the number of uses made of particular selections, and whether the producer acquires motion picture theatre performance rights or only the recording rights. While the film producer seldom bargains with the supplier over the price of particular selections, the fees charged are modest and reflect the fact that such libraries are in active competition with each other and with other sources of music.

8. It is commercially impracticable for television broadcasters to negotiate individually with the composers or publishers whose music appears in theatrical motion pictures, television film series and other syndicated television films and tapes for the television performance rights thereto, for the reasons that:

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(a) Broadcasters do not select, or participate in the selection, of the musical compositions appearing in such films, and it is not practicable for them to do so. When a syndicator or distributor furnishes a film to a broadcaster, the musical compositions used in the film have already been selected by the film producer, and have been recorded, synchronized in timed relation with the action shown, and incorporated into the film sound track. The musical accompaniment appears on the same sound track as the dialogue and cannot readily be changed or altered. Film distributors commonly require as a condition to licensing films to a broadcaster that the broadcaster agree to exhibit the film without altering the musical score.

(b) Inasmuch as a broadcaster cannot exhibit a film unless and until the performance rights with respect to all of the copyrighted compositions used in the film have been cleared, the broadcaster could not conclude a separate licensing agreement with any one composer or publisher whose works are used in the film unless all of the other composers or publishers represented in the film likewise agree to issue television performance licenses to the broadcaster.

(c) ASCAP, its members, and their affiliates have entered into various restrictive agreements and arrangements, set out below in Point IV of this offer of proof, intended to channel television performance rights for li-

censing through ASCAP, and to limit, restrict and interfere with the right of ASCAP members separately to issue performance licenses to broadcasters.

IV.

OFFER OF FACTS TO PROVE THAT BROADCASTERS HAVE NOT, AND CANNOT, OBTAIN THE BENEFITS OF COMPETITION IN THE LICENSING OF FILMED MUSIC UNDER ASCAP'S EXISTING LICENSES AND THAT TO CONSTRUE THE AMENDED FINAL JUDGMENT HEREIN SO AS TO DENY PETITIONERS' PROPOSED LICENSES WOULD BE TO DEFEAT THE PURPOSES OF THAT JUDGMENT AND TO PRESERVE UNLAWFUL RESTRICTIONS IMPOSED BY ASCAP AND ITS MEMBERS CONTRARY TO THE TERMS OF THE JUDGMENT.

1. Prior to 1941 ASCAP required its composer and publisher members to assign to ASCAP the exclusive right to issue performance licenses, and prohibited its members from issuing performance licenses individually. Since ASCAP controlled all or nearly all of the copyrighted music in the United States before 1941, it was impossible for theatrical motion picture exhibitors, radio stations, and other persons regularly performing music for profit to operate successfully without obtaining a performance license from ASCAP.

2. In 1941 a final judgment was entered, by consent, in the action of *United States* v. *American Society of Com-*

posers, Authors and Publishers, et al. (U. S. D. C., S. D. N. Y. Civ. No. 13-95), which prohibited ASCAP from acquiring any exclusive performing rights as agent, trustee, or otherwise on behalf of any copyright owner or other owner of the performing rights, but permitted ASCAP to require all moneys derived from the issuance of licenses by its members to be paid by the licensee to ASCAP for distribution in the same manner as ASCAP's other revenues, which had the effect of discouraging members from licensing their compositions individually at the source in competition with ASCAP or its other members.

3. With respect to theatrical motion picture films it became the uniform practice, after the development of films with a synchronized sound track, for the film producer to acquire only the music recording rights and to require the film exhibitor to obtain a performance license through ASCAP. This practice developed by reason of the fact, as noted above, that prior to 1941 ASCAP prohibited its members from issuing performance licenses individually, and after 1941 discouraged individual composers and publishers from licensing producers at the source by requiring all moneys derived through such licenses to be paid over to ASCAP. Furthermore, the practice developed prior to 1941 for film producers and composers to enter into contractual arangements under which the producer acquired only music recording rights from the composer of the music used in the film and agreed with the composer to assign

the performance rights to ASCAP so as to permit both the composer and the producer (through an affiliated music publishing house) to share in ASCAP's receipts from its theatre licenses. These arrangements were supplemented by provisions in contracts between film distributors and film exhibitors prohibiting the exhibitor from changing or deleting any of the music in films furnished to the exhibitor and further providing that such films could be exhibited only in theatres which had a performance license from ASCAP.

By reason of the foregoing, it was, and until 1948 continued to be, the uniform practice for theatrical film producers to acquire only the music recording licenses and for film exhibitors to take out ASCAP performance licenses.

4. In 1948 the United States District Court for the Southern District of New York enjoined ASCAP from collecting performance fees from domestic theatrical motion picture exhibitors (80 F. Supp. 999 (1948)) and in 1950 the Final Judgment herein was amended, by consent, so as to prohibit ASCAP from issuing performance licenses to or collecting fees from domestic motion picture theatre exhibitors concerning any motion picture performance rights.

5. While film producers have since 1948 obtained theatrical motion picture performance rights at the source in addition to the music recording rights, film producers have

not, and do not, acquire the television performance rights for the reason that:

(a) By reason of the foregoing, it had become, and remained, the uniform practice of film producers not to acquire performance rights (except to the extent required, by reason of the 1950 amendment of the Final Judgment herein, to have the films exhibited in domestic theatrical motion picture houses), which practice enables the producers not only to realize revenue from their sale or rental of films but also to share in ASCAP's performance fees;

(b) Under ASCAP's existing local station television performance licenses, broadcasters pay a performance fee with respect to filmed and taped programs exhibited by them (or in the case of the per program license, filmed and taped programs containing ASCAP music) and thereby relieve the producers of such program material of the necessity of clearing television performance rights at the source while ASCAP's existing licenses continue in effect;

(c) ASCAP, its members, and their affiliates have entered into various restrictive agreements and arrangements, set out below, intended to channel television performance rights in film music for licensing through ASCAP, to inhibit film producers from clearing television performance rights at the source, and to limit, restrict, and interfere with the right of ASCAP members separately to issue non-exclusive performance licenses with respect to such film music, in violation of Section IV(B) of the Amended Final Judgment herein.

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6. While ASCAP's existing licenses do not require the licensee to make license payments with respect to music in films where the producer has cleared the television performance rights at the source (see paragraph 5(H) of the existing ASCAP blanket license agreement and paragraph 4(I) of the existing ASCAP per program license), broadcasters have, by reason of the foregoing, been deprived of any benefits from these provisions. There is no instance, to petitioners' knowledge, where the producer of a theatrical motion picture feature film or television film series has cleared such music at the source when dealing with ASCAP members, and at no time have petitioners been relieved of any payments required pursuant to the foregoing provisions of the existing licenses.

Film producer-music publisher affiliations

7. All, or nearly all, major producers of theatrical motion pictures and television films maintain music publishing subsidiaries or affiliates which are members of ASCAP and through which such producers share in the licensing payments made by television stations to ASCAP under their existing licenses. A partial list of film producers and their ASCAP publishing subsidiaries or affiliates is as follows:

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Producer	*ASCAP Music Publishing Subsidiary or Affiliate*
Warner Bros. Pictures, Inc.	Harms, Inc. Atlas Music Corp. M. Witmark & Sons Remick Music Corp. Advance Music Corp. Fullarton Music Corp. New World Music Corp.
Metro-Goldwyn-Mayer, Inc.	Variety Music, Inc. Lion Music Corporation Robbins Music Corporation Leo Feist, Inc. Miller Music, Inc. Pine Ridge Music, Inc.
Twentieth Century-Fox Film Corp.	Surray Music Corp. Movietone Corp. 20th Century Music Corp.
Paramount Pictures, Inc.	Birdees Music Corp. Famous Music Corp. Paramount Music Corp.
Columbia Pictures Corp.	Colpix Music, Inc. Columbia Pictures Music Corp.
Walt Disney Productions, Inc.	Walt Disney Music Co.
United Artists, Inc.	United Artists Music Co., Inc.
Universal-International Films, Inc.	Universal Music Corp.
Desilu Products, Inc.	Desilu Music Corp.
Revue Studios	Alaska Music Co., Inc.
Four-Star Films, Inc.	BNP Music Publishing Co.

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8. When a film producer maintaining such an ASCAP music-publishing affiliate engages a composer to write music for a film, he commonly enters into an agreement with the composer designed to enable both the producer and the composer to share in the payments made by television stations to ASCAP under their existing performance licenses. A representative form of film producer-composer agreement is annexed hereto as Exhibit 1. Under this agreement the composer assigns to the producer all right, title, and interest, and the statutory copyright and all renewals thereof, to the producer (paragraph 6(a) of Exhibit 1), including the right to collect the publisher's share of performance royalties becoming due and payable from any small performing rights organization by reason of performance of the music (paragraph 6(c) of Exhibit 1). Simultaneously the producer licenses back to the composer the non-dramatic (i.e., "small") performing rights in the music so as to enable the composer to license such non-dramatic performing rights to a performing rights organization (paragraph 6(d) of Exhibit 1). The producer, in turn, assigns the publisher's (50%) share of the television performance rights to his ASCAP music publishing affiliate. Then, by registering the composition with ASCAP, the producer and the composer both share, on a 50-50 basis, in the payments made by television stations under the existing ASCAP licenses.

9. When incorporating existing musical compositions into their films, such producers often select works owned

by their ASCAP affiliate in order to collect the publishers' distributive share of the earnings realized by ASCAP through its existing television performing rights licenses. In many instances the music director, composer, or other person in the employ of the film producer who is charged with the duty of selecting appropriate musical compositions for use in films is a member of ASCAP.

10. Such film producers commonly offer films to television stations only on condition that the station agrees to obtain the necessary television performance licenses from ASCAP, and further require that none of the music in the film be changed when the film is broadcast. A representative form of distribution agreement provides that

> "Licensor [distributor] represents that the performing rights in the music contained in the licensed film or films are: (a) controlled by BMI, ASCAP, SESAC, or any other performing rights society having jurisdiction, or (b) in the public domain, or (c) controlled by Licensor to the extent necessary to permit Licensee's [broadcaster's] use of the said film or films hereunder. Licensor agrees to indemnity Licensee against liability, loss, damages, or expenses arising out of the performance of any music in the said film or films, the performing rights to which are in this category (c). Licensor shall furnish Licensee with the music cue sheets of each film licensed hereunder; and *Licensee agrees to abide by and use the same in the same form as so provided without change. Licensee agrees that it will procure and pay for any licenses required to perform such music* and Licensee

further agrees that it will hold Licensor harmless from any liability, loss, damages, or expense arising from Licensee's failure so to do."

The American Guild of Authors and Composers

11. The American Guild of Authors and Composers is a voluntary association organized under the laws of the State of New York. The great majority of its members are also members of ASCAP. All of the officers of the Guild and all of the members of its governing "council" are members of ASCAP, and number among them several of ASCAP's leading officers and directors, including Stanley Adams, president and a director of ASCAP, Otto Harbach, a vice-president and director of ASCAP, Richard Rodgers, a director of ASCAP, and Arthur Schwartz, assistant secretary and a director of ASCAP. Of ASCAP's twenty-four board members, comprising twelve publisher-members and twelve writer-members, four writer-members (as noted above) are Guild Council members, and of the remaining eight, several have from time to time been members of the Guild.

12. The Guild has promulgated, circulated and encouraged the adoption by ASCAP members of a standard composer-music publisher agreement known as the "Uniform Popular Songwriters Contract," a copy of which is annexed hereto as Exhibit 2. ASCAP members have widely entered into such agreement with music publishers.

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13. This standard agreement is designed to inhibit publishers from granting television performance rights directly to film producers or to television broadcasters and to insure that, in lieu thereof, such rights will be licensed to televison broadcasters through ASCAP. Implementing this purpose, the agreement provides (in paragraph 4(k)) that:

> "Except to the extent that the Publisher and Writer have heretofore or may hereafter assign to or vest in the American Society of Composers, Authors and Publishers the said rights or the right to grant licenses therefor, it is agreed that no licenses shall be granted without the written consent, in each instance, of the Writer for the use of the composition by means of television, or by any means or for any purposes not commercialy established, or for which licenses were not granted by the Publisher on musical compositions prior to June 1, 1937."

Film producer-music publisher agreements

14. In order to share in ASCAP's revenues under its television performance licenses, publisher-members of ASCAP (whether or not affilated with a film producer) assign the television performance rights in copyrighted music owned or controlled by them to ASCAP, and when issuing recording licenses to film producers commonly specify that the film may be shown only over stations licensed by ASCAP. A representative form of music publisher-film producer agreement used by ASCAP pub-

lisher-members is annexed hereto as Exhibit 3. Paragraph 6(a) of the agreement provides that

> "Said musical compositions as recorded in said motion picture may be performed within the territory covered by this license over television networks or local stations having appropriate licenses from any performing right society having jurisdiction in the territory in which said musical composition is so performed."

The Composers and Lyricists Guild of America

15. The Composers and Lyricists Guild of America is the exclusive bargaining agent for composers employed by major producers of theatrical motion pictures and television films. The large majority of its members are also members of ASCAP and most of its officers are members of ASCAP.

16. On or about June 1, 1960 the Guild concluded a collective bargaining agreement, known as the "Minimum Basic Agreement of 1960," with the Association of Motion Picture Producers, representing Columbia Pictures Corp., Warner Bros. Pictures, Inc., Twentieth Century-Fox Film Corp., Metro-Goldwyn-Mayer, Inc., Paramount Pictures, Inc., Walt Disney Productions, Inc., and Allied Artists, Inc. A copy of this agreement is annexed hereto as Exhibit 4. The agreement covers persons who are employed by a producer for the purpose of composing music or lyrics for use in the production of films intended either primarily

for exhibition on television or for television exhibition after initial exhibition in motion picture theatres.

17. With respect to television performance rights, the foregoing agreement provides (in Article 11(c)) that:

> "In order to assure the Composer of participation in the revenue which may be derived from performance of the Compositions, Producer agrees that in the event the Composer is, on the date of his employment by Producer, a member or licensor of a Society, Producer will, and it does hereby, transfer and assign the world-wide Performing Rights (as hereinabove defined) in and to the compositions to the Composer and a publisher of Producer's choice, which publisher may, but need not, be a subsidiary or affiliate of Producer, but which publisher shall be a member or licensor of the same Society, or of an affiliate of the same Society, as the Composer."

18. The purpose of the above quoted provision, as represented to this Court in the present proceedings by the Guild's counsel (Affidavit of Abraham Marcus, January 17, 1962, page 16), is to assure "that the performing right to the music in the films (both theatrical and television) be channeled to the performing right society of the composer's affiliation," which, as the Guild's counsel represented to the Court, in most instances is ASCAP.

19. The Guild is presently engaged in negotiating with the remaining motion picture and television film producers to enter into agreements similar to Exhibit 4. Pending

completion of these negotiations, the parties have agreed on interim provisions either reserving performing rights to the composer or requiring that they be transferred to the composer's performing rights society.

ASCAP's Existing Local Station Blanket Licenses and Network Licenses

20. ASCAP's existing local station blanket licenses limit, restrict, and interfere with the right of ASCAP members to issue to any user non-exclusive performance licenses by providing (par. 5(H)) that no payment shall be required thereunder with respect to a local commercial television program of the broadcaster presented by motion picture or by transcription if a license has been granted by ASCAP at the source to perform such film, but allowing no such credit to the broadcaster if a license at the source has been granted by a member of ASCAP individually. A similar provision is contained in ASCAP's existing network licenses (par. 5(H)).

21. By reason of all of the foregoing restrictive agreements and arrangements, film producers are inhibited, as long as ASCAP's existing local television stations continue in effect, from obtaining from composers and other copyright owners television performance licenses simultaneously with the recording licenses, "dramatic" music licenses, and theatrical motion picture performance licenses which film producers presently obtain, and ASCAP's members are limited and restricted from issuing non-exclusive

television performance licenses individually with respect to such music, in violation of Section IV(B) of the Amended Final Judgment herein. Film producers will be able to acquire, and ASCAP members individually to grant, television performance rights at the source only if broadcasters obtain the television performance licenses for which petitioners have applied to ASCAP and to the Court in the within proceedings.

V.

OFFER OF FACTS TO PROVE THAT PETITIONER'S PROPOSED LICENSES ARE A REASONABLE MEANS OF GIVING BROADCASTERS THE BENEFITS OF COMPETITION IN THE LICENSING OF FILM MUSIC.

1. ASCAP's existing television performance licenses are not indispensable in order adequately to compensate music publishers and composers whose works appear in films shown on television. Film producers commonly contract with authors of literary material, directors, actors and others to apply a specified percentage of the receipts realized through the sale or licensing of particular films towards the latter's compensation, or otherwise to make payments based upon the number of television performances of the film. To assure that the producer makes the necessary payments, such agreements commonly provide that the producer shall maintain or have access to records showing all cities in which films are telecast, the number of telecasters in each city, the television stations on which

telecast, and the dates thereof. Such agreements further commonly provide that if the producer sells, transfers, assigns or otherwise disposes of its rights in any film, or in the event of a foreclosure of any chattel mortgage, pledge, lien or security agreement affecting the title to the motion picture film, the party acquiring the film shall make the required compensation payments.

2. Petitioners' proposed licenses would not present ASCAP with unreasonably burdensome problems of policing compliance with the licenses by local station. It would not be necessary to require licensees to maintain elaborate records showing compositions performed on each licensee's broadcasts, such as are required under ASCAP's existing "per program" licenses. In order to determine whether a program is covered or excluded from the proposed license it would only be necessary for the broadcaster to maintain records showing particular filmed programs played. Such records must be maintained by broadcasters under the FCC's existing rules and regulations. Music "cue" sheets showing the date a film is produced and identifying the music used in it are regularly prepared by film producers and furnished to ASCAP for use in connection with ASCAP's present music use surveys.

3. To avoid prejudice to ASCAP members vis-a-vis the members of Broadcast Music, Inc. ("BMI"), another music rights licensing organization, petitioners offered to ASCAP to defer the effective date of the provisions for exclusion

of future-produced pre-recorded programs in petitioners' proposed licenses until such time as a like exclusion is applicable with respect to television broadcasters' performance licenses with BMI.

4. Adoption of petitioners' proposed license would not forthwith withdraw from the coverage of petitioners' proposed licenses a substantial portion of the programs covered by ASCAP's existing local station licenses. Under petitioners' proposed licenses, stations would continue to make payments with respect to all pre-recorded program material heretofore produced, or whose production is commenced prior to February 28, 1962 or such other date as may be fixed by the Court. At the present time thousands of theatrical motion picture films, television film series, and other television films are available for broadcasting by local stations, and are likely to continue to comprise the bulk of pre-recorded material presented by local stations for a substantial period of time.

VI.

Offer of facts to prove that petitioners' proposed licenses are consistent with the provisions of the amended final judgment concerning "blanket" and "per program" licenses.

1. In prior proceedings under Section 9 of the Amended Final Judgment herein ASCAP has repeatedly acknowl-

edged its obligation under the decree to issue both "blanket" and "per program" licenses to broadcasters.*

2. ASCAP's position that a license is a "blanket" or "per program" license within the meaning of the Amended Final Judgment only if it covers all of the programs of the licensee, and that for this reason petitioners' proposed licenses are not "blanket" or "per program" licenses, is inconsistent with the terms of ASCAP's existing blanket and per program licenses for the reason that such licenses presently exclude from their coverage all network television programs (pars. 1(A) and 2(B) of the blanket license and pars. 1(A) and 2(D) of the per program license), programs consisting of "dramatic" musical presentations (pars. 1(B) of the blanket and per program licenses) and "cooperative programs" (par. 5(F) of the blanket license and par. 4(F) of the per program license).

3. Petitioners' position that a license is a "blanket" license within the meaning of the Amended Final Judgment if it requires the licensee to make payments with respect to programs covered by the license irrespective of whether or not such programs contain ASCAP music, and that a license is a "per program" license if it requires the licensee to make payments only with respect to programs covered by the license which also use ASCAP music is consistent

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* Excerpts from such prior proceedings are set out in Appendix A annexed hereto.

both with the terms of the existing licenses and the licenses petitioners seek in this proceeding.

Dated:

April 17, 1962

Respectfully submitted,

Donovan Leisure Newton & Irvine
Attorneys for Petitioners
2 Wall Street
New York 5, New York

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APPENDIX A

In a proceeding brought by a group of television stations in 1951 under Section 9 of the Amended Final Judgment herein, ASCAP moved to have the Judgment amended so as to relieve ASCAP from its obligation under the Judgment to issue "per program" licenses to stations holding music performance licenses from BMI. Set out below is Section 7 of the Judgment showing ASCAP's proposed additions, which are italicized:

"'Defendant ASCAP, in licensing rights for public performance for radio broadcasting and telecasting, is hereby:

(A) Enjoined and restrained from issuing any license, the fee for which

(1) in the case of commercial programs, is based upon a percentage of the income received by the licensee from programs which include no compositions in the ASCAP repertory, or

(2) in the case of sustaining programs, does not vary in proportion either (a) to the performance of the compositions in the ASCAP repertory during the term of the license, or (b) to the number of programs on which such compositions or any of them are performed,

unless the radio broadcaster or telecaster to whom such license shall be issued shall desire a license on either or both of such basis, *or unless such radio or television broadcaster shall have accepted a license from Broadcast Music, Inc. or any other organization*

licensing the right of public performance if such organization is or shall be owned or controlled by broadcasters or telecasters.

(B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses, the fee for which

(1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,

(2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in connection with such program if it had been commercial, and

(3) subject to the other provisions of Section VIII, takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs, with the objective that such stations shall have a genuine economic choice between per program and blanket licenses. *The provisions of this Subsection (B) shall not apply where such radio*

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broadcaster or telecaster shall have accepted a license from Broadcast Music, Inc., or any other organization licensing the right of public performance if such organization is or shall be owned or controlled by broadcasters or telecasters.

(C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license *if such prospective licensee is entitled under the provisions of this Section VII to a per program license.*' "

In support of ASCAP's foregoing motion (which was subsequently withdrawn) Otto Harbach, then president of ASCAP, submitted an affidavit dated August 7, 1951, in which he stated with reference to Section 7 of the Judgment that:

" '. . . the purpose of making a "per program" license available was to afford an optional basis of licensing for those broadcasters who preferred to pay for copyrighted music only on the basis of receipts from those individual programs which contained such music.' " (p. 2)

Likewise, ASCAP's counsel submitted an affidavit dated June 27, 1952, stating that:

" 'The purpose of making a "per program" license available was to afford an optional basis of licensing for those broadcasters who preferred to pay for copyrighted music only on the basis of charges to sponsors of individual programs which contain music in the ASCAP repertory.' " (p. 5)

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In a recent proceeding by a group of radio stations under Section 9 of the Amended Final Judgment herein, Oscar Hammerstein on January 23, 1959, submitted an affidavit on behalf of ASCAP in which he stated:

> "Since 1941 in accordance with the original Consent Judgment entered March 4, 1951 and the Amended Final Judgment herein, the Society has offered both blanket licenses and per program licenses to users in the broadcasting industry. The difference between the two forms of licensing, both of which authorize the user to perform any compositions in the Society's repertory—is in the method of computing license fees." (p. 2)

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EXHIBIT 1

AGREEMENT made this day of , 19 by and between

(herein called "Company"), and

(herein called "Composer").

In consideration of the mutual covenants herein contained, the parties hereto have agreed and do agree as follows:

1. Composer, as an independent contractor, shall compose, prepare and deliver to Company certain original musical material (hereinafter referred to as the "music"), more particularly described as follows (it being understood that the mention of any program or program series in said description is for purposes of identification only and shall in no way restrict Company's rights in the music, and the use thereof, as set forth in this agreement):

2. (a) For all rights herein granted to Company, and for performance by Composer of all obligations hereunder, Company shall pay a fee of:

payable within one (1) week after the delivery of the music.

(b) Nothing herein contained shall be deemed to impose any obligation on Company to use or authorize the use of

the music, and Company shall have fully discharged its obligations to Composer hereunder by payment to Composer of the amount specified in subparagraph (a) of this paragraph 2.

3. *Additional Paragraphs; Riders:* This agreement includes additional paragraphs 4 through 10, attached hereto and by this reference made a part hereof. Composer by execution of this agreement below, acknowledges that Composer has read said additional paragraphs and that Composer is fully aware of the provisions therein contained. If any riders, duly initialled by Company and Composer, are attached to this agreement said riders shall be considered as a part of this agreement as though fully set forth herein.

IN WITNESS WHEREOF, the parties have executed this agreement on the day and year first above written.

_____ _____

(Composer) (Company)

By: _____

—1—

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4. Composer shall deliver one copy of the music, fully scored for an orchestra, consisting of such instrumentation as Company shall designate, to Company within ten (10) days from and after the date of this agreement.

5. It is understood and agreed that Composer may compose the music at such times and places as Composer may choose, subject only to Composer's obligation to make timely delivery of the music in accordance with the terms of this agreement. It is further agreed that Composer may employ the services of third parties in connection with the composing and preparation of the music, provided that said third parties shall be Composer's employees for all purposes whatsoever and shall be employed by Composer at Composer's sole cost and expense and provided further that employment of such third parties shall in no manner affect the grant of rights in the music or Composer's warranties, as set forth in this agreement.

6. (a) Upon composition of the music, as aforesaid, all right, title and interest therein shall automatically vest in Company, and Company shall be entitled to copyright therein, including statutory copyright and all renewals thereof, as copyright proprietor; in connection with the foregoing, and without limiting the generality thereof, Composer agrees to and does hereby grant to Company all copyright renewal rights which may hereafter be vested in Composer as author of music and Composer expressly acknowledges that the payment of the fee specified in paragraph 2 above includes payment for the grant of such copy-

right renewal rights hereunder. Company may freely assign and grant rights and licenses with respect to the music and any copyright therein, (including any renewals thereof) and in this connection Composer, as author thereof, agrees to execute and deliver to Company any and all instruments required by Company in connection with the use and enjoyment of the music and of Company's rights therein and thereto (including, but not limited to, any instruments necessary to enable Company to renew the copyright in the United States or elsewhere) and Composer hereby appoints Company as Composer's attorney-in-fact to execute any such instruments in Composer's name on Company's behalf.

(b) Without in any way limiting the generality of the foregoing, it is agreed that Company shall have the exclusive right to use, adapt, arrange, change, add to, or subtract from the music and to combine the same with other musical and or literary material and to publish, record, produce; reproduce, transmit, perform, broadcast, telecast, and or otherwise communicate the same or any version or versions thereof by any means (including, but not limited to, in synchronization with motion pictures) whether now known or hereafter devised, publicly for profit or otherwise; it being understood that Composer hereby waives any so-called "moral rights" which may now be or may hereafter be recognized.

(c) Further, in the exercise of its rights hereunder and without in any way limiting the generality of the foregoing,

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Company shall have, as owner and copyright proprietor of the music, the complete control of the publication of the music and of all rights incident thereto, including, but not limited to, the right to license the manufacture of phonograph records and other recordings of the music and the right to license motion picture synchronization rights (all of which rights are herein sometimes collectively called "music publishing rights").

—2—

C-1 Composer
12/60

(cc) Without limiting the generality of any rights granted under this agreement, Composer expressly acknowledges that Company, its successors, assigns and/or licensees shall have the right to collect the publisher's share of performance royalties becoming due and payable from any small performing rights society by reason of performance of the music; it is further understood that Company may represent to any foreign small performing rights society requiring an acknowledgment of the type herein set forth that Composer has, in fact, made the acknowledgment herein contained.

—2a—

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(d) Notwithstanding anything in subparagraph (a) of this paragraph 6 to the contrary, during any period or periods of time, during which Composer is affiliated with any small performing rights society (herein called the "Society"), Company shall and does hereby, under and pursuant to this paragraph, license back to Composer non-dramatic (i.e., "small") performing rights in the music so as to enable Composer to license such non-dramatic performing rights to Society, it being understood, in this connection, that this agreement shall not be construed as granting Company (or any assignee or licensee of all or any of Company's rights under this agreement) the right to exercise such non-dramatic performing rights during such period or periods without obtaining a license therefor from Society, except that Company and/or any such assignee or licensee, may exercise such non-dramatic performing rights in the music by reason of, under and pursuant to this agreement,

(i) during any period or periods during which such non-dramatic performing rights are not controlled by and available for license at standard rates from Society, or in the case of public performances of the music in geographical areas outside of Society's jurisdiction, from any other organization or society which is affiliated with Society or which has a collection agreement with Society and which controls the non-dramatic performing rights in any geographical area in which the music is to be performed; and/or

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(ii) in connection with theatrical exhibitions in the United States, its territories and possessions; and or

(iii) in connection with any performance of the music within the United States, its territories and possessions, which is not a public performance for profit.

7. Composer hereby warrants that Composer is free and able to enter into and fully perform this agreement and to grant all rights herein granted. Further, Composer warrants that the music in the form in which it is delivered shall be wholly original with Composer and shall not be copied from any other work and shall not, nor shall the use thereof infringe or violate the copyright or any common-law right or any personal, proprietary, or other right of any kind whatsoever of any person, firm, corporation or association. If any of the music delivered hereunder is described as based upon traditional or public domain compositions, Composer warrants that such compositions are in the public domain throughout the world and that Composer's treatment of such compositions is original and shall not be copied from any work other than such public domain compositions, nor shall the use thereof infringe or violate the copyright or any common-law right or any personal, proprietary or other right of any kind whatsoever of any person, firm, corporation or association. Notwithstanding the foregoing, if any of the music delivered hereunder is described as based upon musical materials furnished by Company or as based upon traditional or public domain

compositions furnished by Company, Composer makes no warranty as to the originality or ownership of such musical materials or compositions.

8. Composer will indemnify and hold Company, its successors, assigns and licensees, any stations over which the music shall be broadcast, the sponsors, if any, of any program on which it is broadcast, and their advertising agencies, if any, and any other parties who shall utilize the music or any part thereof in any way with Company's permission, and the directors, officers, agents and employees

of any of the foregoing, free and harmless from any and all claims, damages, liabilities, costs and expenses, including reasonable counsel fees, arising out of any use of the music, or any part thereof, or arising out of any breach by Composer of any warranty or agreement made by Composer herein.

9. It is understood and agreed that all or part of this agreement and all the results and proceeds thereof may be assigned by Company to any third party without Composer's consent and in this event, Company's successors and/or assigns shall be entitled to any and all rights, privileges, and equities to which Company is entitled under and by virtue of this agreement.

10. (a) This agreement shall be governed by and construed in accordance with the laws of the State of California applicable to contracts entered into and fully to be performed therein.

(b) A waiver by either party of any of the terms and conditions of this agreement in any one instance shall not be construed to be a waiver of such term or condition for the future, or of any subsequent breach thereof. All remedies, rights, undertakings, obligations and agreements contained in this agreement shall be cumulative and none of them shall be in limitation of any other remedy, right, undertaking, obligation or agreement of either party.

(c) This agreement contains the entire understanding of the parties hereto relating to the subject matter herein

contained and this agreement cannot be changed, rescinded or terminated orally.

(d) If more than one person signs this agreement as "Composer", the rights and obligations of each such signatory shall be joint and several and all references throughout this agreement to "Composer" shall mean and refer to each signatory individually and to all such signatories jointly, so that a breach of any provision of this agreement shall be deemed a breach of each and all such signatories, it being understood that all such signatories assume each every duty and obligation hereunder, both jointly and severally. All payments specified herein shall be in full satisfaction of the services of all such signatories and, if this agreement does not provide for a division of such payments between such signatories, Company shall have no responsibility or liability with regard to the division of such payments between such signatories.

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MUSIC PUBLISHING RIGHTS RIDER ATTACHED TO AND FORMING A PART OF THAT CERTAIN AGREEMENT

BETWEEN (COMPANY), AND (COMPOSER).

Dated

With respect to Company's exercise of music publishing rights, (as defined in subparagraph 6(c) of this agreement, Company agrees to pay Composer as royalties:

(i) sums equal to (%) per cent of the net proceeds (as defined below) received by Company from third parties for licenses for the manufacture of commercial phonograph records and or licenses of theatrical motion picture synchronization rights (as defined below);

(ii) for regular piano copies, if any, sold and paid for at wholesale in the United States and or Canada, sums equal to three (3¢) per copy;

(iii) sums equal to (%) per cent of net proceeds received by Company from third parties for regular piano copies, if any, sold and paid for at wholesale outside of the United States and or Canada;

(iv) with respect to orchestrations, including band arrangements, if any, sold and paid for at wholesale anywhere in the world, sums equal to ten (10%) per cent of the wholesale price therefor, after trade discounts;

(v) with respect to any song book, folio or similar publication, if any, sold and paid for at whole-

sale anywhere in the world, sums equal to the amount resulting from dividing ten (10%) per cent of the wholesale price after trade discounts, therefor by the total number of copyrighted musical compositions contained in such publication.

No royalties shall be payable hereunder for professional material not sold or resold; further, no royalties shall be payable to Composer with respect to uses of the music except as hereinabove expressly set forth. The term "theatrical motion picture rights" as used in this Rider refers to synchronization rights granted with respect to motion pictures intended primarily and initially for theatrical release by direct projection before paid-admission audiences; in no event shall such term refer to motion pictures or other methods of recordation, whether now known or hereafter devised, which are produced primarily and initially for television broadcasting by any means whatsoever. The term "net proceeds" as used hereinabove, shall mean all moneys actually received by Company (or any assignee of Company's rights hereunder) which are directly attributable to licenses issued authorizing the manufacture of commercial phonograph records and or licenses relating to theatrical motion picture synchronization rights, and or for the exercise of publication rights referred to in subclause (iii) above, as the case may be, after the deduction of all costs, expenses, fees and commissions which are direct'y attributable to the exploitation of the music by way of commercial phonograph records or by way of theatrical motion picture synchronization, or by way of publication,

as the case may be, computed in accordance with good and standard accounting practices. In the event that Company licenses the music in a form containing lyrics or other musical materials composed by any third party or parties, then Composer's royalties hereunder, with respect to the music in such form, shall be reduced proportionately to an amount equal to the royalties payable hereunder, divided by the number of composers and lyricists (including Composer) who have furnished materials and services for such music. Company shall render royalty statements to Composer, accompanied by any remuneration due Composer, such statements to be rendered at least once during each calendar year during which royalties are payable.

If, for any reason, exportation of money from any foreign country, territory, or place, to the United States should be prohibited, prevented or rendered commercially impracticable, the amount received by Company (if Company's share thereof is actually paid to Company in such foreign country, territory or place) shall not be considered gross receipts hereunder unless, and until the same shall have actually been received in the United States in United States currency, less any discounts, losses, costs or expenses suffered by or imposed upon Company with respect to transmittal of such money to the United States and the conversion thereof to United States currency, provided, however, that if Composer so requests in writing, that portion of such blocked or frozen funds which would represent Composer's share of net proceeds of such gross receipts, but for being frozen or blocked, shall be deposited

in Composer's name in any bank or depository designated by Composer in such country wherein such funds are blocked or frozen subject to the laws of such country with respect to such deposits and withdrawals by Composer therefrom. Composer shall have the right to inspect Company's books and records relative to gross receipts derived from use of the music hereunder provided such inspection shall be made at Company's offices during reasonable business hours.

Initial Here

C-1 Composer
12/60

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EXHIBIT 2

American Guild of
Authors & Composers

Authorized for use by _____

_____

under agreement dated _____ 19___ and *Void Valid Unless Countersigned by SPA*

[EMBLEM]

Copyright 1948
Songwriters Protective Association

1947 Revised

UNIFORM POPULAR SONGWRITERS CONTRACT

Agreement made this _____ day of _____, 19___

between _____

(hereinafter called "Publisher") and _____

_____

jointly and or severally hereinafter collectively called "Writer"):

WITNESSETH:

Composition

1. The Writer hereby sells, assigns, transfers and delivers to the Publisher a certain heretofore unpublished

original musical composition, written and or composed by the above-named Writer now entitled

(hereinafter referred to as "the composition"), including the title, words and music thereof, and the right to secure copyright therein throughout the entire world, and to have and to hold the said copyright and all rights of whatsoever nature thereunder existing, for the original term of the United States copyright or for the period of twenty-eight years from the date of publication in the United States, whichever may be shorter, and subject to the terms of this contract.

ASCAP Membership

2. In all respects this contract shall be subject to any existing agreements between any of the parties hereto and the American Society of Composers, Authors and Publishers.

Warranty

3. The Writer hereby warrants that the composition is his sole, exclusive and original work, that he has full right and power to enter the within contract, and that there exists no adverse claim to or in the composition, except as aforesaid in Paragraph 2 hereof and except such rights as are specifically set forth in Paragraph 23 hereof.

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ROYALTIES

4. In consideration of this contract, the Publisher agrees to pay the Writer as follows:

ADVANCE

(a) $_____ as an advance against royalties, receipt of which is hereby acknowledged, which sum shall remain the property of the Writer and shall be recoupable only from payments hereafter becoming due the Writer under this contract.

PIANO COPIES

(b) In respect of regular piano copies sold and paid for in the United States and Canada, a royalty per copy according to whichever one of the following provisions is checked:

FIXED ROYALTY

☐ (i) _____¢ (in no case less than 3¢ per copy.)

SLIDING SCALE

☐ (ii) _____¢ (in no case, however, less than 1½¢) of the wholesale selling price of the first [illegible] copies or less, but in no event less than 2½¢ per copy; plus

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_____% (in no case, however, less than 14%) of the wholesale selling price of copies in excess of 100,000 and not exceeding 200,000, but in no event less than 3¢ per copy; plus

_____% (in no case, however, less than 16%) of the wholesale selling price of copies in excess of 200,000 and not exceeding 300,000, but in no event less than 3½¢ per copy; plus

_____% (in no case, however, less than 18%) of the wholesale selling price of copies in excess of 300,000 and not exceeding 400,000, but in no event less than 4¢ per copy; plus

_____% (in no case, however, less than 20½%) of the wholesale selling price of copies in excess of 400,000 and not exceeding 500,000, but in no event less than 4½¢ per copy; plus

_____% (in no case, however, less than 23%) of the wholesale selling price of all copies in excess of 500,000, but in no event less than 5¢ per copy.

FOREIGN ROYALTIES

(c) _____% (in no case, however, less than 50%) of all net sums received by the Publisher in respect of regular piano copies, orchestrations, band arrangements, octavos, quartets, arrangements for combinations of voices and or instruments, and or other copies of the composition sold in any country

other than the United States and Canada, provided, however, that if the Publisher should sell such copies through or cause them to be sold by a subsidiary or affiliate which is actually doing business in a foreign country, then in respect of such sales, the Publisher shall pay to the Writer not less than 5% of the market retail selling price in respect of each such copy sold and paid for.

ORCHESTRATIONS AND OTHER ARRANGEMENTS, ETC.

(d) _____% (in no case, however, less than 10%) of the wholesale selling price (after trade discounts if any) of each copy sold and paid for in the United States and Canada, of for export from the United States, of orchestrations, band arrangements, octavos, quartets, arrangements for combinations of voices and or instruments, and or other copies of the composition (other than regular piano copies).

PUBLISHER'S SONG BOOK, SONG SHEET, FOLIO, ETC._____.

(e) (i) If the composition, or any part thereof, is included in any song book, song sheet, folio or similar publication issued by the Publisher containing at least four, but not more than twenty-five musical compositions, the royalty to be paid by the Publisher to the Writer shall be an amount determined by dividing 10% of

the wholesale selling price (after trade discounts, if any) of the copies sold, among the total number of the Publisher's copyrighted musical compositions included in such publication. If such publication contains more than twenty-five musical compositions, the said 10% shall be increased by an additional ½% for each additional musical composition. The composition shall not, however, be included in any such publication earlier than six months after the date on which regular piano copies of the composition shall have been published, except that said six months period may be reduced to three months with the Writer's written consent given at any time after the expiration of three months.

LICENSEE'S SONG BOOK, SONG SHEET, FOLIO, ETC.

(ii) If, pursuant to a license granted by the Publisher to a licensee not controlled by or affiliated with it, the composition, or any part thereof, is included in any song book, song sheet, folio or similar publication, containing at least four musical compositions, the royalty to be paid by the Publisher to the Writer shall be that proportion of 50% of the gross amount received by it from the licensee, as the number of uses of the composition under the license

and during the license period, bears to the total number of uses of the Publisher's copyrighted musical compositions under the license and during the license period. The lyrics alone of the composition may be included in such a publication at any time, but the lyrics and music thereof, in combination, shall not be included earlier than two years after the date on which regular piano copies of the composition shall have been published. Such royalties shall be computed and paid within 30 days after the expiration of the term of each license, but if any such license term is in excess of one year, such royalties shall be computed and paid annually.

(iii) In computing the number of the Publisher's copyrighted musical compositions under subdivisions (i) and (ii) hereof, there shall be excluded musical compositions in the public domain and arrangements thereof and those with respect to which the Publisher does not currently publish and offer for sale regular piano copies.

(iv) Royalties on publications containing less than four musical compositions shall be payable at regular piano copy rates.

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PROFESSIONAL MATERIAL AND FREE COPIES

(f) As to "professional material" not sold or resold, no royalty shall be payable. Free copies of the lyrics of the composition shall not be distributed except under the following conditions: (i) with the Writer's written consent; or (ii) when printed without music in limited numbers for charitable, religious or governmenal purposes, or for similar public purposes, if no profit is derived, directly or indirectly; or (iii) when authorized for printing in a book, magazine or periodical, where such use is incidental to a novel or story (as distinguished from use in a book of lyrics or a lyric magazine or folio), provided that any such use shall bear the Writer's name and the proper copyright notice; or (iv) when distributed solely for the purpose of exploiting the composition, provided, that such expioitation is restricted to the distribution of limited numbers of such copies for the purpose of influencing the sale of the composition, that the distribution is independent of the sale of any other musical compositions, services, goods, wares or merchandise, and that no profit is made, directly or indirectly with connection therewith.

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MECHANICALS, ELECTRICAL TRANSCRIPTION SYNCHRONIZATION, ALL OTHER RIGHTS

(g) .....% (in no case, however, less than 50%) of:

All gross receipts of the Publisher in respect of any licenses (including statutory royalties) authorizing the manufacture of parts of instruments serving to mechanically reproduce the composition, or to use the composition in synchronization with sound motion pictures, or to reproduce it upon a electrical transcription for broadcasting purposes; and of any and all gross receipts of the Publisher from any other source or right now known or which may hereafter come into existence, except as provided in subdivision (i) of this paragraph 4.

LICENSING AGENT'S CHARGES

(h) If the Publisher administers licenses authorizing the manufacture of parts of instruments serving to mechanically reproduce said composition, or the use of said composition in synchronization or in timed relation with sound motion pictures, or its reproduction upon electrical transcriptions, or any of them, through an agent, trustee or other administrator acting for a substantial part of the industry and not under the exclusive control of the Publisher (hereinafter sometimes referred to as licensing agent), the Publisher, in determining his receipts,

shall be entitled to deduct from gross license fees paid by the Licensees, a sum equal to the charges paid by the Publisher to said licensing agent, provided, however, that in respect to synchronization or timed relation with sound motion pictures, said deduction shall in no event exceed $150.00 or 10% of said gross license fee, whichever is less; in connection with the manufacture of parts of instruments serving to mechanically reproduce said composition, said deductions shall not exceed 2½% of said gross license fee, and in connection with electrical transcriptions, said deductions shall not exceed 10% of said gross license fee.

PERFORMING SOCIETY ROYALTIES

(i) The Writer shall not be entitled to any share of the monies distributed to the Publisher by the American Society of Composers, Authors and Publishers or any other performing rights society throughout the world which makes a distribution to writers either directly or through the American Society of Composers, Authors and Publishers of an amount which, in the aggregate, is at least equal to the aggregate amount distributed to publishers.

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BLOCK LICENSES

(j) The Publisher agrees that the use of the composition will not be included in any bulk or block license heretofore or hereafter granted, and that it will not grant any bulk or block license to include the same, without the written consent of Songwriters' Protective Association on behalf of the Writer in each instance, except: (i) that the Publisher may grant such licenses with respect to electrical transcription for broadcasting purposes, but in such event, the Publisher shall pay to the Writer that proportion of 50% of the gross amount received by it under each such license as the number of uses of the composition under each such license during each such license period bears to the total number of uses of the Publisher's copyrighted musical compositions under each such license during each such license period; in computing the number of the Publisher's copyrighted musical compositions for this purpose, there shall be excluded musical compositions in the public domain and arrangements thereof and those with respect to which the Publisher does not currently publish and offer for sale regular piano copies; and with respect to such licenses, the Publisher shall account to the Writer annually; (ii) that the Publisher may appoint agents or representatives in countries outside of the United States and Canada to use and to grant licenses for the

use of the composition on the customary royalty fee basis under which the Publisher shall receive not less than 10% of the marked retail selling price in respect of regular piano copies, and 50% of all other revenue; if, in connection with any such bulk or block license, the Publisher shall have received any advance, the Writer shall not be entitled to share therein, but no part of said advance shall be deducted in computing the composition's earnings under said bulk or block license. A bulk or block license shall be deemed to mean any license or agreement, domestic or foreign, whereby rights are granted in respect of two or more musical compositions.

TELEVISION AND NEW USES

(k) Except to the extent that the Publisher and Writer have heretofore or may hereafter assign to or vest in the American Society of Composers, Authors and Publishers the said rights or the right to grant licenses therefor, it is agreed that no licenses shall be granted without the written consent, in each instance, of the Writer for the use of the composition by means of television, or by any means, or for any purposes not commercially established, or for which licenses were not granted by the Publisher on musical compositions prior to June 1, 1937.

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WRITER'S CONSENT TO LICENSES.

(i) The Publisher shall not, without the written consent of the Writer in each case, give or grant any right or license (i) to use the title of the composition, or (ii) for the exclusive use of the composition in any form or for any purpose, or for any period of time, or for any territory, other than its customary arrangements with foreign publishers, or (iii) to give a dramatic representation of the composition or to dramatize the plot or story thereof, or (iv) for a vocal rendition of the composition in synchronization with sound motion pictures, or (v) for any synchronization use thereof after the expiration of ten years from the date on which regular piano copies of the composition shall have been first published, or (vi) for the use of the composition or a quotation or excerpt therefrom in any article, book, periodical, advertisement or other similar publication. If, however, the Publisher shall give to the Writer written notice, by registered mail or telegram, specifying the right or license to be given or granted, the name of the licensee and the terms and conditions thereof, including the price or other compensation to be received therefor, then, unless the Writer (or any one or more of them) shall, within seventy-two hours (exclusive of Saturdays, Sundays and holidays) after the delivery of such notice to the address of the Writer hereinafter designated,

object thereto, the Publisher may grant such right or license in accordance with the said notice without first obtaining the consent of the Writer. Such notice shall be deemed sufficient if sent to the Writer at the address or addresses hereinafter designated or at the address or addresses last furnished to the Publisher in writing by the Writer.

TRUST FOR WRITER

(m) Any portion of the receipts which may become due to the Writer from license fees (in excess of offsets), whether received directly from the licensee or from any licensing agent of the Publisher, shall, if not paid immediately on the receipt thereof by the Publisher, belong to the Writer and shall be held in trust for the Writer until payment is made; the ownership of said trust fund by the Writer shall not be questioned whether the monies are physically segregated or not.

WRITER PARTICIPATION

(n) The Publisher agrees that it will not license as a result of which it will receive any financial benefit in which the Writer does not participate.

WRITER CREDIT

(o) Every license or authorization issued by the Publisher authorizing the publication of the composition or any part thereof shall contain a provision requiring the user thereof to print, in addition to the copyright notice, the name of the Writer as the author thereof.

CHANGE IN PIANO COPY ROYALTY.

(p) If a fixed royalty is designated to be payable with respect to regular piano copies of the composition (as provided in paragraph 4(b)(i)), then, if at any time, the Publisher shall increase or decrease the wholesale selling price which it charged on January 1, 1947 to regular music jobbers for regular piano copies of musical compositions of the same class or category as the composition, then the said fixed royalty shall be increased or decreased in proportion to the change in said wholesale selling price.

WRITERS' RESPECTIVE SHARES

5. Whenever the term "Writer" is used herein, it shall be deemed to mean all of the persons named herein below, and any and all royalties herein provided to be paid to the Writer shall be paid jointly to the following persons if

there be more than one, and shall be divided among them as follows:

Name	Share

PUBLICATION

6. (a) The Publisher shall, within one year from the date hereof, make, publish and offer for sale regular piano copies of the composition in the form and through the channels customarily employed by it for that purpose, and in addition, either (i) cause a commercial phonograph recording to be made and distributed in the customary form and through the customary commercial channels, or (ii) make, publish and offer for sale a dance orchestra arrangement. As an alternative to compliance with (i) or (ii), the Publisher shall pay to the Writer the sum of $250.00 less the aggregate of any advances paid, as stated in Paragraph 4(a) hereof, and any royalties paid to the Writer within said one-year period. If, in the statement of "Special Exceptions" hereinafter set forth, the composition shall have been designated as one which is not intended for publication

in regular piano copies, the Publisher shall be deemed to have complied with this paragraph by the making and distribution of a commercial phonograph recording and either the publication of a dance orchestra arrangement or the payment of the $250.00 all as aforesaid.

FAILURE TO PUBLISH

(b) Should the Publisher fail to comply with the provisions of subdivision (a) hereof, the Writer shall be entitled to demand in writing the return of the composition at any time after the expiration of said year, whereupon the Publisher must, within one month after the receipt of such notice, either comply with the provisions of subdivision (a) hereof, in which event this contract will remain in full force and effect, or upon its failure so to comply, this contract shall terminate and all rights of any and every nature in and to the composition and in and to any and all copyrights secured thereon in the United States and throughout the world, shall re-vest in and become the property of the Writer and shall be reassigned to him by the Publisher; the Writer will not be obligated to return or pay to the Publisher any advance or indebtedness as a condition of such re-assignment; the said re-assignment shall be in accordance with and subject to the provisions of Paragraph 13 hereof, and in addition, the Publisher shall pay to the Writer all gross sums which it has theretofore or may thereafter receive in respect of the composition.

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WRITER'S COPIES

(c) The Publisher shall furnish the Writer copies of the composition which it publishes and shall use its best efforts to furnish or cause to be furnished to the Writer copies published by others.

FOREIGN COPYRIGHT

7. (a) Each copyright on the composition in countries other than the United States shall be secured only in the name of the Publisher, and the Publisher shall not at any time divest itself of said foreign copyright directly or indirectly, except to the extent that it may be obligated to do so by virtue of an agreement entered into by the Publisher with a foreign publisher prior to January 1, 1947, and then only for the term of said agreement.

FOREIGN PUBLICATION

(b) Except to the extent that the Publisher is obligated to a foreign publisher or licensee by written agreement made prior to January 1, 1947, and then only for the term of said agreement, no rights shall be granted by the Publisher in the composition to any foreign publisher or licensee inconsistent with the term hereof, nor shall any foreign publication rights in the composition be given to a foreign publisher or licensee unless and until the Publisher shall have complied with the provisions of Paragraph 6 hereof.

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FOREIGN ADVANCE

(c) If foreign rights in the composition are separately conveyed, otherwise than as a part of the Publisher's current and or future catalog, not less than 50% of any advance received in respect thereof shall be credited to the account of and paid to the Writer.

FOREIGN PERCENTAGE

(d) The percentage of the Writer on monies received from foreign sources shall be computed on the Publisher's net receipts, provided, however, that no deductions shall be made for offsets of monies due from the Publisher to said foreign sources; or for advances made by such foreign sources to the Publisher, unless the Writer shall have received at least 50% of said advances.

NO FOREIGN ALLOCATIONS

(e) In computing the receipts of the Publisher from licenses granted in respect of synchronization with sound motion pictures, or in respect of any world-wide licenses, or in respect of licenses granted by the Publisher for use of the composition in countries other than the United States, no amount shall be deducted for payments or allocations to publishers or licensees in such countries.

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TERMS OF CONTRACT

8. All rights in and to the composition and any copyrights secured thereon throughout the world, shall revert to the Writer upon expiration of the original term of the United States copyright or at the end of twenty-eight (28) years from the date of publication in the United States, whichever period shall be shorter. The Publisher shall, at the expiration of said period, execute any and all documents which may be necessary or proper to re-vest in the Writer any and all rights in and to the composition and in and to any copyright in the United States or any other countries throughout the world provided, however, that if the Writer shall sell or assign to some person other than the Publisher, his rights in the United States renewal copyright in the composition, or any of his rights in the composition in the United States or elsewhere, for the period beyond said original term or twenty-eight years, as the case may be, then, unless there shall have been given to the Publisher at least six months' written notice of an intention to offer said rights for sale, the Publisher shall not be obligated to assign to the Writer said rights in countries other than the United States and Canada, and this contract, and the assignment under Paragraph 1 hereof, shall continue in respect of such rights in countries other than the United States and Canada.

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NEGOTIATIONS FOR NEW OR UNSPECIFIED USES

9. If the Publisher desires to exercise a right in and to the composition now known or which may hereafter become known, but for which no specific provision has been made herein, the Publisher shall give written notice to the Writer thereof. Negotiations respecting all the terms and conditions of any such disposition shall thereupon be entered into between the Publisher (and/or the Music Publishers' Protective Association, Inc.) and the Songwriters' Protective Association; and no such right shall be exercised until specific agreement has been made.

ROYALTY STATEMENTS AND PAYMENTS

10. The Publisher shall render to the Writer, hereafter, royalty statements accompanied by remittance of the amount due on or before, each May 15th covering the 3 months ending March 31st; each August 15th covering the 3 months ending June 30th; each November 15th covering the 3 months ending September 30th; each February 15th covering the 3 months ending December 31st; provided, however, that if it shall have heretofore been the custom of the Publisher to render royalty statements accompanied by remittance of the amount due semi-annually, or quarterly at the end of different quarterly periods, such custom may be continued. The Writer may at any time, or from time to time, make written request for a detailed royalty statement, and the Publisher shall, within sixty days, com-

ply therewith. Such royalty statements shall set forth in detail the various items, foreign and domestic, for which royalties are payable hereunder and the amounts thereof, including, but not limited to, the number of copies sold and the number of uses made in each royalty category. If a use is made in a publication of the character provided in Paragraph 4, subdivision (c) hereof, there shall be included in said royalty statement the title of said publication, the publisher or issuer thereof, the date of and number of uses, the gross license fee received in connection with such publication, the share thereto of all the writers under contract with the Publisher, and the Writer's share thereof. There shall likewise be included in said statement a description of every other use of the composition, and if by a licensee or licensees their name or names, and if said use is upon a part of an instrument serving to reproduce the composition mechanically, the type of mechanical reproduction, the title of the label thereon, the name or names of the artists performing the same, together with the gross license fees received, and the Writer's share thereof.

EXAMINATION OF BOOKS

11. (a) The Publisher shall from time to time, upon written demand of the Writer or his representative, permit the Writer or his representative to inspect at the place of business of the Publisher, all books, records and documents relating to the composition and all licenses granted, uses had and payments made therefor, such right of inspection

to include, but not by way of limitation, the right to examine all original accountings and records relating to uses and payments by manufacturers of commercial phonograph records and music rolls; and the Writer or his representative may appoint a certified public accountant who shall at any time during usual business hours have access to all records of the Publisher relating to the composition for the purpose of verifying royalty statements rendered or which are delinquent under the terms hereof.

(b) The Publisher shall, upon written demand of the Writer or his representative, cause any licensing agent in the United States and Canada to furnish to the Writer or his representative, statements showing in detail all licenses granted, uses had and payments made in connection with the composition, which licenses or permits were granted, or payments were received by or through said licensing agent, and to permit the Writer or his representative to inspect at the place of business of such licensing agent, all books, records and documents of such licensing agent, relating thereto. Any and all agreements made by the Publisher with any such licensing agent shall provide that any such licensing agent will comply with the terms and provisions hereof. In the event that the Publisher shall instruct such licensing agent to furnish to the Writer or his representative statements as provided for herein, and to permit the inspection of the books, records and documents as herein provided, then if such licensing agent should refuse to comply with the said instructions, or any of them, the Publisher agrees to institute and prosecute diligently and in good

faith such action or proceedings as may be necessary to compel compliance with the said instructions.

(c) With respect to foreign licensing agents, the Publisher shall make available the books or records of said licensing agents in countries outside of the United States and Canada to the extent such books or records are available to the Publisher, except that the Publisher may in lieu thereof make available any accountants' reports and audits which the Publisher is able to obtain.

DEFAULT IN PAYMENT OR PREVENTION OF EXAMINATION

12. If the Publisher shall fail or refuse, within sixty days after written demand, to furnish or cause to be furnished, such statements, books, records or documents, or to permit inspection thereof, as provided for in Paragraphs 10 and 11 hereof, or within thirty days after written demand, to make the payment of any royalties due under this contract, then the Writer shall have the option, to be exercised upon ten days' written notice, to terminate this contract. However, if the Publisher shall:

(a) Within the said ten-day period:

(i) serve upon the Writer a written notice demanding arbitration; and

(ii) if the demand be for statements, books, records or documents, or to permit inspection thereof, deposit with Music Publishers' Protective Association, Inc., a re-assignment to

the Writer of the copyright and all other rights in and to the composition, to be held in escrow pending the determination of the arbitration, or if the demand be for royalties, then deposit in escrow with Music Publishers' Protective Association, Inc., the amount shown by its books to be due the Writer under the provisions of this contract; and,

(b) Submit to arbitration its claim that it has complied with its obligation to furnish statements, books, records or documents, or permitted inspection thereof, or to pay royalties, as the case may be, or both, and thereafter comply with any award of the arbitrators within ten days after such award or within such time as the arbitrators may specify;

then this contract shall continue in full force and effect as if the Writer's option had not been exercised. But if the Publisher shall fail to comply with the foregoing provisions, then this contract shall be deemed to have been terminated as of the date of the Writer's exercise of his option to terminate this contract.

TERMINATION OF CONTRACT

13. Upon the termination of this contract, all rights of any and every nature in and to the composition and in and to any and all copyrights secured thereon in the United States and throughout the world, shall re-vest in and be-

come the property of the Writer, and shall be re-assigned to the Writer by the Publisher free of any and all encumbrances of any nature whatsoever, provided that:

(a) The said re-assignment by the Publisher may however, be subject to such rights, if any, as may have been vested in a foreign publisher respecting the use of the composition in countries other than the United States and Canada under any agreement made prior to January 1, 1947.

(b) If the Publisher, prior to such termination, shall have granted a domestic license for the use of the composition, not inconsistent with the terms and provisions of this contract, the reassignment may be subject to the terms of such license.

(c) In either of the events mentioned in subdivisions (a) and (b) of this paragraph, however, the Publisher shall assign to the Writer all rights which it may have under any such agreement or license in respect of the composition, including, but not limited to, the right to receive all royalties or other monies earned by the composition thereunder after the date of termination of this contract. Should the Publisher thereafter receive or be credited with any royalties or other monies so earned, it shall pay the same to the Writer.

(d) The Writer shall not be obligated to return or pay to the Publisher any advance or indebtedness as a condition of the re-assignment provided for in this

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Paragraph 13, and shall be entitled to receive the plates and copies of the composition in the possession of the Publisher.

(e) The termination of this contract shall not relieve the Publisher of its obligation to pay any and all royalties which may have accrued to the Writer prior to such termination.

(f) The Publisher shall execute any and all documents and do any and all acts or things necessary to effect any and all re-assignments to the Writer herein provided for.

NOTICES

14. All written demands and notices provided for herein shall be sent by registered mail.

SUITS FOR INFRINGEMENT

15. Any legal action brought by the Publisher against any alleged infringer of the composition shall be initiated and prosecuted at its sole cost and expense, but if the Publisher should fail, within thirty days after written demand, to institute such action, the Writer shall be entitled to institute such suit at his cost and expense. All sums recovered as a result of any such action shall, after the deduction of the reasonable expense thereof, be divided equally between the Publisher and the Writer. No settlement of any such action may be made by either party with-

on first notifying the other: in the event that either party should object to such settlement, then such settlement shall be made if the party objecting assumes the prosecution of the action and all expenses thereof, except that any sums thereafter recovered shall be divided equally between the Publisher and the Writer after the deduction of the reasonable expenses thereof.

INFRINGEMENT CLAIMS

16. (a) If a claim is presented against the Publisher alleging that the composition is an infringement upon some other work or a violation of any other right of another, and because thereof the Publisher is jeopardized, it shall forthwith serve a written notice upon the Writer, setting forth the full details of such claim. The pendency of said claim shall not relieve the Publisher of the obligation to make payment of the royalties to the Writer hereunder, unless the Publisher shall deposit said royalties as and when they would otherwise be payable, in an account in a bank or trust company in the City of New York in the joint names of the Publisher and the Writer. If no suit be filed within nine months after said written notice from the Publisher to the Writer, all monies deposited in said joint account shall be paid over to the Writer plus any interest which may have been earned thereon.

(b) Should an action be instituted against the Publisher claiming that the composition is an infringement upon some other work or a violation of any other right of another, the

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Publisher shall forthwith serve written notice upon the Writer containing the full details of such claim. Notwithstanding the commencement of such action, the Publisher shall continue to pay the royalties hereunder to the Writer unless it shall, from and after the date of the service of the summons, deposit said royalties as and when they would otherwise be payable, in an account in a bank or trust company in the City of New York in the joint names of the Publisher and the Writer, if the said suit shall be finally adjudicated in favor of the Publisher or shall be settled, there shall be released and paid to the Writer all of such sums held in escrow less any amount paid out of the Writer's share with the Writer's written consent in settlement of said action. Should the said suit finally result adversely to the Publisher, the said amount on deposit shall be released to the Publisher to the extent of any expense or damage it incurs and the balance shall be paid over to the Writer.

(c) In any of the foregoing events, however, the Writer shall be entitled to payment of said royalties or the money so deposited at and after such time as he files with the Publisher a surety company bond, or a bond in other form acceptable to the Publisher, in the sum of such payment to secure the return thereof to the extent that the Publisher may be entitled to such return. The foregoing payments or deposits or the filing of a bond shall be without prejudice to the rights of the Publisher or Writer in the premises.

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ARBITRATION

17. Any and all differences, disputes or controversies arising out of this contract shall be submitted to arbitration under the laws of the State of New York, and the parties hereby individually and jointly agree to abide by and perform any award rendered in such arbitration, and agree that a judgment of the Supreme Court of the State of New York may be entered upon such award. Together with the demand for arbitration, the party making said demand shall designate an arbitrator and the adverse party shall, within ten days thereafter, likewise designate an arbitrator. The two arbitrators so chosen shall promptly appoint a third arbitrator who shall act as chairman, and any award concurred in by a majority of the arbitrators shall be binding upon the parties. Should the party against whom arbitration is demanded fail to select an arbitrator, or should the arbitrator selected by the parties be unable to agree upon a third arbitrator, then said arbitrator or arbitrators, as the case may be, shall be designated and appointed in the manner provided by the Arbitration Law of the State of New York.

ASSIGNMENT

18. Except to the extent herein otherwise expressly provided, the Publisher shall not sell, transfer, assign, convey, encumber or otherwise dispose of the composition or the copyright or copyrights secured thereon without the prior written consent of the Writer. The Writer has been induced

to enter into this contract in reliance upon the value to him of the personal service and ability of the Publisher in the exploitation of the composition, and by reason thereof, it is the intention of the parties and the essence of the relationship between them that the rights herein granted to the Publisher shall remain with the Publisher and that the same shall not pass to any other person, including without limitations, successors to or receivers or trustees of the property of the Publisher, either by act or deed of the Publisher or by operation of law, and in the event of the voluntary or involuntary bankruptcy of the Publisher, this contract shall terminate; provided, however, that the composition may be included by the Publisher in a bona fide voluntary sale of its music business or its entire catalog of musical compositions, or in a merger or consolidation of the Publisher with another corporation; and provided further that the composition and the copyright therein be assigned by the Publisher to a subsidiary or affiliated company generally engaged in the music publishing business. If the Publisher is an individual, the composition may pass to a legatee or distributee as part of the inheritance of the Publisher's music business and entire catalog of musical compositions. Any such transfer or assignment shall, however, be conditioned upon the execution and delivery by the transferee or assignee to the Writer of an agreement to be bound by and to perform all of the terms and conditions of this contract to be performed on the part of the Publisher.

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SUBSIDIARY DEFINED

19. A subsidiary, affiliate, or any person, firm or corporation controlled by the Publisher or by such subsidiary or affiliate, as used in this contract, shall be deemed to include any person or corporation under common control with, or the majority of whose stock or capital contribution is owned or controlled by the Publisher or by any of its officers, directors, partners or associates, or whose policies and actions are subject to domination or control by the Publisher or any of its officers, directors, partners or associates.

MINIMUMS

20. The minimum amount and percentages specified in this contract shall be deemed to be the amounts and percentages agreed upon by the parties hereto, unless greater amounts or percentages are inserted in the blank spaces provided therefor.

COUNTERSIGNATURE AND MODIFICATIONS

21. This contract is binding upon and shall inure to the benefit of the parties hereto and their respective successors in interest (as hereinbefore limited), but shall be effective only when countersigned by the Songwriters' Protective Association. If the Writer (or one or more of them) shall

not be living, any notices may be given to, or consents given by, his or their successors in interest. No change or modification of this contract shall be effective unless reduced to writing, signed by the parties hereto, and countersigned by the Songwriters' Protective Association.

MARGINAL NOTES

22. The marginal notes are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope or intent of this contract nor in any way effect this contract.

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EXCEPTIONS TO WARRANTIES

23. The rights specifically excepted, as provided in Paragraph 3 hereof are as follows:

Witness: _____ Publisher _____

_____ By _____

Witness: _____ Address _____

_____ Writer _____ (L.S.)

Witness: _____ Address _____

_____ Writer _____ (L.S.)

Witness: _____ Address _____

_____ Writer _____ (L.S.)

_____ Address _____

AMERICAN GUILD OF AUTHORS & COMPOSERS
formerly
Countersigned: SONGWRITERS' PROTECTIVE ASSOCIATION

By: _____

* * * * * *

Special Exceptions to apply only if filled in and initialed by the parties.

☐ (a) The composition is:

☐ Standard ☐ Pastoral
☐ Secular ☐ Instrumental

and the Publisher is not required to publish piano copies or otherwise comply with the provisions of Paragraph 6.

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☐ (b) The composition is one of a number of musical compositions delivered to the Publisher by the Writer under an agreement dated , a copy of which is hereto annexed. Unless a shorter period is stated in the annexed agreement, the Writer shall not be entitled to demand the return of the composition for the Publisher's failure to publish regular piano copies or otherwise comply with the provisions of Paragraph 6, until five years after the expiration of the said annexed agreement.

☐ (c) The composition is part of an original score (not an interpolation) of

☐ Living Stage Production
☐ Motion Picture
☐ *Night Club Revue*

which is the subject of an agreement between the parties dated , a copy of which is hereto annexed. Unless said agreement requires compliance with Paragraph 6 in respect of a greater number of musical compositions, the Publisher shall be deemed to have complied with said Paragraph 6 with respect to the composition if it fully performs the terms of said Paragraph 6 in respect of any one musical composition included in said score.

☐ (d) The composition is not one intended to be published in regular piano copies.

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EXHIBIT 3

NEW YORK, N. Y.

In consideration of the sum of
Dollars ($), for the synchronizing rights hereinafter set forth, receipt whereof is hereby acknowledged, and Dollars ($), for the performing rights hereinafter set forth, payment for which is to be made as herein provided,
(hereinafter referred to as the Publisher), hereby gives to
its sucessors and assigns, the non-exclusive, irrevocable right and license, privilege, and authority to record, in any manner, medium, form, or language, in any country within the territory covered by this license, the words and music of the musical composition hereinbelow set out, and to make copies of such recordings, and to import said recordings and/or copies of said recordings into any country within the territory covered by this license, all in accordance with the terms, conditions and limitations hereinafter set out:

1. The composition covered by this license is:

by:

2. The title of the motion picture with which said musical composition is to be used is:
(for theatric and television-film release).

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3. The type of use to be made of the musical composition is:

and the amount of uses to be made is:

4. The license hereinabove set out is limited to the use of said musical composition in synchronism or timed-relation with the motion picture hereinabove specified, and the air, screen and television trailers thereof, during the life of the copyright of said musical composition.

5. The undersigned warrants that the said musical composition as covered by this agreement may be performed in public in theatres and other places having valid licenses from any performing right society having jurisdiction in the territory in which said musical composition is performed. However, the consideration of $ hereinabove designated for the sound film performing rights for the United States of America and its Possessions shall be paid by you to us Six (6) months from the date of this license unless prior to such time you shall have obtained a valid legal license covering such performance rights either from the American society of Composers, Authors and Publishers or from some other association or society duly authorized and which shall at that time be legally entitled to collect performance fees in the United States of America.

6. The right to perform said musical composition as recorded in said motion picture, by means of television for

any and all purposes, is and shall be available under the following circumstances:

(a) Said musical composition as recorded in said motion picture may be performed within the territory covered by this license over television networks or local stations having appropriate licenses from any performing right society having jurisdiction in the territory in which said musical composition is so performed. However, it is understood that the performing rights herein provided for shall exclude the right to perform the said musical composition in connection with the exhibition of the said motion picture by means of "closed circuit" television.

7. The territory covered by this license is:

8. The undersigned warrants only that it is the owner of the recording rights herein conveyed, and this license is given without other warranty or recourse, except for the Publisher's agreement to repay the consideration paid for this license if said warranty shall be breached; and the Licensor further reserves to itself all rights and uses in and to said musical composition not herein specifically granted.

_____

By: _____

(Agent and Trustee)

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EXHIBIT 4

PRODUCER—COMPOSERS AND LYRICISTS GUILD OF AMERICA
MINIMUM BASIC AGREEMENT OF 1960

THIS AGREEMENT, executed as of this 1st day of June, 1960, by and between COMPOSERS AND LYRICISTS GUILD OF AMERICA, an unincorporated association of composers and lyricists, hereinafter referred to as the "Guild," and

.....

hereinafter referred to as the "Producer."

WITNESSETH:

Article 1. *Definitions*

The following terms or words used herein shall have the respective meanings indicated below:

(a) A "composer" is a person who is employed by the Producer for the purpose of composing music and or lyrics for use in the production of motion picture photoplays.

(b) "Composing" is the act, process or art of creating music or lyrics or both.

(c) "Underscoring" is music composed or used to accompany dramatic action or visual images in motion pictures, but having no significance to the actors and of which the actor is not, as part of the story or plot, aware.

(d) "Song" is (i) the music and lyric of any separate musical composition of which the actors in the motion pic-

ture are aware as part of the plot or story, or (ii) the music and lyric of a separate musical composition intended to be heard by the audience.

(e) A "member of the Guild in good standing" shall be a member of the Guild who has tendered the initiation fees and periodic dues uniformly required as a condition of acquiring or retaining membership.

Article 2. *Effective Date*

The effective date of this agreement is June 1, 1960. The terms and conditions of this agreement shall not apply to individual employment contracts with composers in effect on June 1, 1960, during the term of such contracts including option extensions thereof, except however that Article 11 herein entitled "Rights Arising From Compositions" shall be applicable as of June 1, 1960, with respect to compositions which would otherwise be subject to this agreement and which are written on and after such date under such contracts.

Article 3. *Term of Agreement*

The term of this agreement shall commence on June 1, 1960 and shall continue to and including May 31, 1964. The provisions of this agreement shall continue in effect during negotiations for extension or modification of this agreement, which shall commence sixty (60) days after written notice by either party but not prior to April 1, 1964, and the new

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agreement shall be effective upon and as of a date to be agreed upon during the negotiations.

Article 4. *Recognition*

(a) This agreement shall apply only to services rendered under employment with Producer. It shall not apply to material purchased or otherwise licensed, nor to independent contractors, or supervisory employees, or to other employees whose participation in writing lyrics or music may be incidental to their bona fide employment in other capacities.

When a person is under the direction and control of the Producer as to the selection of and the manner and means by which the music for the motion picture is to be composed, he shall not be deemed to be an independent contractor. The conducting of an orchestra, as such, shall not thereby necessarily constitute such person a supervisory employee, for the purpose of this agreement.

(b) The Producer shall deliver to the Guild once each week a list of the names of composers in Producer's employ at any time during the preceding week; provided that failure on the part of the Producer to furnish any list shall not constitute a default by the Producer or a breach of this agreement, unless the Producer fails to deliver such list within seven (7) days after receiving from the Guild a written request so to do. Inadvertent failure on the part of the Producer to comply with the provisions of this paragraph shall in no event constitute a default by the Producer, or a breach of this agreement.

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Article 5. *Guild Shop*

(a) During the term of this agreement, each composer employed by the Producer shall be or become a member of the Guild in good standing on or after the 30th day following the beginning of such employment, or the effective date of this Article, whichever is later.

For the purpose of this paragraph (a) of this Article 5, the date of the beginning of employment shall be the date of the first employment of such a composer with any member company of the Association of Motion Picture Producers, Inc.

The foregoing interpretation of the term "first employment" has been approved in principle by an advisory opinion of the General Counsel of the National Labor Relations Board. If such General Counsel or the local Regional Director of the Board, or the Board or a court of competent jurisdiction shall change such opinion or ruling, then the new ruling or opinion shall prevail until the same is reversed by a court of competent jurisdiction.

(b) The provisions of paragraph (a) of this Article shall not apply:

(1) To a composer who is not a member of the Guild at the time of his first employment, and who does not become a member in good standing within the 30 days, as above provided, for the period necessary to permit him to complete the performance of

his services in connection with his then current assignment.

(2) To a composer whom the Producer employs as a condition of the sale or license of material.

(3) To a composer employed by reason of special skill or knowledge.

(4) To a composer who on or before the effective date of this Article entered into an agreement with Producer and who was not on such date a member of the Guild in good standing, for the full term of such employment agreement including options, renewal periods and extensions exercisable by the Producer.

However, the composers employed by the Producer within exceptions (2) or (3) above, shall not exceed 10% of the total number of composers in the employ of the Producer. For the purpose of such computation, if the Producer has in his employ at any time less than ten (10) composers then one of such composers so employed may fall within one of the exceptions mentioned in subparagraph (2) or (3) above. Promptly following the employment of any composers claimed by the Producer to be within exceptions (2) or (3) above, the Producer will notify the Guild in writing of the name of the composer employed, the date of the employment agreement and the fact that the Producer claims that such composer is an exception hereunder.

For the purpose of such computation, a composer who is employed under an exclusive contract by a Producer shall be regarded as being employed by the Producer at all times during the term of such contract, including periods during which the composer may be on layoff and periods during which such contract may be suspended by reason of illness or default of the composer or otherwise. The composer shall be regarded as continuing in the employ of the Producer by which he is employed regardless of the fact that his services may be loaned to another Producer.

(c) Promptly after request by any person designated by the Producer, the Guild will admit such person to membership in the Guild upon terms and conditions not more burdensome to such person than those then applicable to other applicants. Membership shall be effective as of the date of such request. Guild agrees that during the term it will not impose any unreasonable initiation fee as a condition to admission to membership, and agrees that during the term hereof it will not impose upon its members any obligation to pay dues that do not uniformly apply to all members of the Guild. It is agreed that the Guild shall not close its membership books or otherwise prevent any person who wishes to become or remain a composer from becoming a member of the Guild, but on the contrary (subject to the provisions hereof relating to waivers as to members suspended or expelled) will make available the privileges of membership to any and all composers employed by the Producer. The Guild will reinstate or readmit to membership any composer who applies for reinstatement or readmission.

after being declared to be not in good standing or after suspension, expulsion, or resignation for any reason whatsoever, provided the composer will apply for such reinstatement or readmission and with such application tender to the Guild unpaid dues permitted by law, and upon such tender the Producer may employ or continue to employ such composer. Instead of readmitting or reinstating such composer, the Guild may at its option grant to the Producer a waiver as to such composer, in which event, for the purpose of determining the Producer's compliance with the provisions of this Article 5, such composer shall not be considered as being employed by the Producer.

(d) If during any time that a composer is employed by the Producer under a contract of employment such composer is or becomes a member of the Guild in good standing and if such composer shall subsequently and before his employment under such contract terminates cease to be a member of the Guild in good standing, then:

(1) If such composer has ceased or shall cease to be a member for any reason other than his failure to pay dues, such composer shall, for the purposes of this agreement, be deemed to remain a member of the Guild in good standing throughout the composer's employment under said contract of employment as the same may be extended or renewed.

(2) If the composer has ceased or shall cease to be a member in good standing by reason of his failure to pay dues, such composer shall, for the purposes of this agreement, be deemed to remain a member

in good standing for a period of fifteen (15) days after written notice that he has ceased to be a member in good standing for failure to pay dues from the Guild to both such composer and the Producer, and if, prior to the expiration of said fifteen (15) days period payment of said dues shall be made by the composer or the Producer, then for the purposes of this agreement, such composer shall not lose his status as a member in good standing. To the extent that it may be lawful for the Producer to do so the Producer may require as a condition to employment that any composer execute such written consent or consents as may be necessary so that, if the Producer elects, it may pay to the Guild any dues of any composer and the Producer shall have the right insofar as its obligations to the Guild and to any composer under the terms and provisions of this agreement are concerned, if it elects, to deduct the amount of such dues from any compensation then or thereafter due or to become due to the composer; provided, however, that if either such payment or reduction is or shall become contrary to law or any statute or is declared by any court of competent jurisdiction in the State of California or by any Federal court or the National Labor Relations Board or its General Counsel or by any other Board or individual having jurisdiction over the matter to be in violation of any applicable law or statute, and if by reason thereof Producer fails to deduct and

pay to the Guild such dues as aforesaid and shall notify the Guild thereof in writing within the fifteen (15) day period after any notice from the Guild above mentioned, then although such dues are not paid within the fifteen (15) day period for the purposes of this agreement such composer shall nevertheless be deemed to remain a member of the Guild in good standing throughout the term of the composer's employment as the same may be extended or renewed.

(3) Producer may require that if a composer shall fail or refuse to become or remain a member of the Guild in good standing as above provided, its employment agreement with such composer shall terminate.

(4) If the Producer is required or directed by any decision of a court of competent jurisdiction or any proper governmental authority to refund to any composer, in whatsoever form the same may be recovered, any dues deducted and paid to the Guild by the Producer under the provisions of subparagraph (2) of this paragraph, the Guild agrees to repay to the Producer the amount of such dues so refunded. The Guild will cooperate with the Producer in obtaining the necessary authorizations from composers for the payment and deduction of dues in the manner provided in subparagraph (2) above.

(e) The Guild will facilitate employment of its members by the Producer and will at all reasonable times promptly furnish to the Producer in writing information concerning the status of any of its members, and the Producer shall be entitled to rely upon such information so furnished by the Guild. Promptly after the execution hereof the Producer will furnish to the Guild a list of the composers then employed by it.

(f) The Guild represents and warrants that discipline, resignation, admission, reinstatement, readmission and all other matters relating to membership status will at all times during the term hereof be within the exclusive jurisdiction of the Guild; and the Guild agrees that it will exercise such jurisdiction subject to and in accordance with the provisions and intent of this Article 5 and of any other applicable provisions of this agreement.

(g) It is understood that the provisions of this Article 5 shall never under any circumstances be so construed during the term of this agreement as to constitute or permit what is known as a "closed shop" or construed in any manner that will at any time deprive the Producer of its right to employ or continue the employment of a composer who is not a member of the Guild in good standing, or who does not become a member of the Guild in good standing within the period prescribed in paragraph (a) of this Article 5 if the Producer has reasonable grounds for believing that such a membership was not available to such composer on the same terms and conditions generally applicable to other like members of the Guild, or if the Producer has reasonable

grounds for believing that membership in the Guild was denied, deferred, suspended or terminated for reasons other than the failure of such person to tender the applicable initiation fee and or periodic dues uniformly required as a condition for acquiring or retaining membership in the Guild.

Article 6. *Credits for Screen Composition*

Credit for composition is to be given for the initial use of the composed music or lyrics, but only in the motion picture for which it was specifically composed and used, subject to the following:

(a) Screen credit for composition for underscoring music, subject to this agreement, shall be given to those who actually compose the music used in the motion picture as follows:

(1) Each composer whose music composed for the picture constitutes more than one-third (1/3) of the total underscoring contained in the final motion picture, which contribution shall be determined in minutes, will be given screen credit. However, in no event shall Producer be required to give more than two such composers such credit. If one-third (1/3) or more of the total scoring used in the motion picture is by one composer, he is to receive credit even if the music was previously used, unless such composer does not desire a credit, or it would be a burden on Producer to make such a determination. In any event, credit for any such re-used music need be given by Producer to only one

composer. Producer, however, may give credit for composition underscoring to a composer whose music is less than one-third (1/3) of the total underscoring contained in the motion picture.

(2) The form of underscoring screen credit shall be:

"Music by"; or "Music Score by"; or "Music composed by"; or words of a similar nature; and in addition such other credits as may be agreed upon by the composer and Producer.

(3) The Producer shall give to the Guild and composers of the underscoring music (which is subject to credits) used in the final motion picture, notice of credits intended to be used. If no protest, that an appropriate composer has been denied the required credits, is received from them by Producer within 48 hours, excluding Saturdays, Sundays and holidays, after such notice is given, the credits shall be deemed to be final. If any such composer or the Guild should within such time protest to Producer the lack of such required credit, then the question of whether each of the composers concerned composed more than the required one-third (1/3) of the underscoring should be resolved by the composers involved and the Guild, within 96 hours, excluding Saturdays, Sundays and holidays, after such protest is made. Such a determination of the quantity of such composers contribution shall be final as to the parties involved. The authority of the Guild and such composers shall be limited to this sole issue. If no such determination

is made by the Guild and the composers within such 96 hours, the credits as submitted by the Producer shall be final. When such credits so become final, there shall be no appeal of any kind, from them. The above procedure and conditions shall be the exclusive remedy for determining any dispute arising in connection with credits hereunder for underscoring."

(b) The form of credits for songs shall be:

"New Songs by"; or "Song by"; or "Songs by"; or "Original Songs by"; or "Music & Lyrics by"; or "Words and Music by"; or "Words by and Music by"; or "Lyrics by and Music by"; or words of a similar nature; and in addition, such other credits as may be agreed upon by the composer and Producer.

(c) Notwithstanding the above provisions, Producer may give screen credit for composition to a composer who is not entitled to credit as above provided, if such composer has "box office" value.

Producers shall in good faith, make the determination of whether a composer employed by it has "box office" value, as that term is used and understood in the motion picture industry. If the Guild shall claim an abuse by the Producer, the matter shall be submitted to the Cooperative Comittee.

(d) The Producer shall not be limited as to the size or placement of the credit.

(e) With respect to material purchased or otherwise licensed, Producer shall have the unlimited right, as it may see fit, to give or not give screen credit for the composition of music or lyrics in any manner.

(f) If a composer, at the time of his employment or at any time thereafter, states in writing that he is not and never was a member of the Communist Party, and such representation is shown to have been false, or if a composer at any time refuses on request of Producer to make a statement as to whether he is or ever was a member of the Communist Party, or if a composer upon such request states in writing that he is a member of the Communist Party, or if a composer before the House Un-American Activities Committee or any similar duly constituted Congressional or State Legislative or executive committee, has refused to testify as to whether he is or was a member of the Communist Party, or if a composer having been subpoenaed to appear before such a committee fails or refuses to appear in response to such subpoena, the Producer shall be relieved of its obligations to the Guild under this Article 6, and shall also be relieved of any obligations to accord credit to the composer under his employment agreement.

The Producer, however, shall not be relieved of its obligation to give such credit by reason of any act or failure to act, on the part of the composer, described in the preceding sentence, if prior to the composer's employment by the Producer (i) such act or failure to act by such composer had occurred and (ii) such occurrence was known to the Producer.

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Article 7. *Cue Sheets*

Producer shall prepare for each motion picture a music cue sheet designating the composer of each cue and every part thereof indicating the nature and duration of its use in such motion picture. The cue sheet may also indicate any other information desired by Producer. Upon request of the composer, Producer will furnish one copy of the cue sheet to such composer and one copy to the Guild. If no protest is made to the Producer by the composer within 10 days after receipt by the composer, the composer shall be deemed to have waived any breach of this Article; but if a protest is so made the Producer shall correct the cue sheet if Producer agrees it is erroneous or shall refer the protest to the Conciliation Committee for determination, but such protest shall not be subject to arbitration. An inadvertent failure by the Producer under any provisions of this Article shall not be considered a breach of this agreement.

Article 8. *Force Majeure*

Suspension of payment of salary permitted by the so-called "force majeure" clause of employment agreements with composers shall be limited with respect to each continuous cause of suspension, as follows:

(a) Composers receiving the minimum compensation, may be suspended for 6 weeks without salary.

(b) Composers receiving above the minimum, but less than $1,000 per week may be suspended for 8 weeks without salary.

(c) As to composers receiving $1,000 per week or more, the matter of suspension of services and reduction of compensation shall be subject to individual negotiations between the Producer and the composer.

Article 9. *Delivery of Contracts*

Producer agrees that from and after the effective date hereof, upon the employment of any composer, such composer shall be tendered, within a reasonable length of time a written contract setting forth the terms of employment. Upon the full execution of such written employment contract, not less than two (2) copies thereof shall be delivered to the composer or his agent and either or both of such copies shall be executed by the Producer, and if both of such copies are not executed by the Producer, the copy not so executed shall be accurately conformed by an officer or employee of the Producer, who shall place upon any such conformed copy his signature or initials in form sufficient to identify such officer or employee. Upon the full execution of an employment contract between the Producer and a member of the Guild, the Producer will make available at its studio in Los Angeles County, California, a properly conformed copy of such employment agreement, which may be called for and retained by the Guild.

Article 10. *Speculative Composition*

The Producer and the Guild agree that there shall be no speculative composition, nor shall either party condone it as a practice.

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The Producer and the Guild recognize that there is possibly an area wherein the proper and constructive exchange of ideas and criticism between a composer and a Producer may be claimed by the Guild to be speculative composition. Whenever the Guild feels that speculative composition has occurred, the case will be referred to conciliation and arbitration and the Producer's intent as determined by the facts shall be an important factor in the consideration.

The Producer will not agree with any composer that the composer shall write on speculation or that payment shall be contingent upon the acceptance or approval of the Producer, except that this does not limit the submission of original composition or prevent the Producer from discussing with any composer any ideas suggested by such composer; or discussing with any composer any ideas or any material suggested by the Producer in order to determine the composer's thoughts and reactions with respect to any such idea or other material for the treatment or development thereof. Without in any way limiting the free exchange of ideas and constructive suggestions in connection with the submission of material by a composer to the Producer, and without limiting the composer's right to revise the material as a result of such exchange of ideas, the Producer and the composer will not, in the absence of a contractual relationship, engage in revising such material under continuous direction and supervision by the Producer.

It is understood that if a Producer enters into an agreement with any person who undertakes to compose material

on an Independent Contract or similar basis and the Producer pays such person a separate consideration and receives therefor an option or right of first refusal to acquire the Motion Picture or other rights in such material when completed, neither such agreement, nor the consummation thereof by the acquisition of such rights shall constitute a violation of the provisions of this Article 10.

Article 11. *Rights Arising From Composition*

(a) As used in this Article 11, the following terms shall have the following meanings:

"Compositions" means any and all music and lyrics written, composed, submitted, added, improvised, interpolated or invented by the Composer in the course of his employment by the Producer.

"Society" means any performing rights society, or other collection agency or organization, which, either directly or through affiliates, maintains a regular system of collecting fees from the users of Compositions for the privilege of performing the same in public for profit, for the benefit of both composer-members and publisher-members, and which divides its aggregate net collections of such fees equally between its publisher-members and composer-members, or which has agreed in writing to divide its net collections with respect to performances of the Compositions involved equally between the Composer and the publisher, hereinafter referred to.

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"Performing Rights" means those public performing rights which are, from time to time, as a practical matter, administered and controlled by the Society involved.

(b) The Producer, as employer for hire of the Composer, is entitled to and shall own all rights of every kind and character, without any restriction, limitation or reservation whatsoever, in and to the Compositions, and the copyrights therein, and any and all renewals and extensions of such copyrights everywhere in the world, specifically including the copyrights and all renewals and extensions thereof in the United States. Without limiting the generality of the foregoing, it is specifically understood and agreed that included in the ownership of all rights of the Producer in and to the Compositions is the specific and irrevocable right under any and all circumstances, in perpetuity, to perform publicly for profit, or otherwise, and to authorize others so to do (by any and all present and future methods and means of public performance, whether or not now known or contemplated) the Compositions, or any part or parts thereof, throughout the world. Such rights include, but are not limited to, the Performing Rights, as hereinabove defined.

(c) In order to assure the Composer of participation in the revenue which may be derived from performances of the Compositions, Producer agrees that in the event the Composer is, on the date of his employment by Producer, a member or licensor of a Society, Producer will, and it does hereby, transfer and assign the world-wide Perform-

ing Rights (as hereinaboye defined) in and to the Compositions to the Composer and a publisher of Producer's choice, which publisher may, but need not, be a subsidiary or affiliate of Producer, but which publisher shall be a member or licensor of the same Society, or of an affiliate of the same Society, as the Composer. Notwithstanding anything herein contained, however, there is hereby excepted and reserved from said transfer and assignment the non-exclusive right to perform the Compositions in any and all situations, throughout the world, where it is, or may from time to time be, unlawful for the Society or any of its affiliated bodies to collect performance fees, or where the Society, or any of its affiliated bodies, does not, from time to time, for any reason whatsoever, actually maintain a regular system of collecting performance fees. In any and all such situations, the Producer may authorize the performance of the Compositions in and as a part of the motion picture in which they are included and trailers thereof, or otherwise, without payment of any performance fees whatsoever to the Composer, or to the Society, or to the publisher or anyone else.

(d) The Producer has agreed to and does hereby transfer and assign the Performing Rights, as set forth in Paragraph (c) above, only conditioned upon and subject to the following:

(1) That the motion pictures (including trailers) and copies thereof containing the Compositions may be exhibited at any place in respect of which there is

subsisting a valid license granted by the Society or by one of its affiliated bodies (as the case may be).

(2) That no such license shall be required for performing the Compositions:

(i) for the purpose of reproducing the same in synchronism or time relation with the motion pictures and copies thereof during the production thereof;

(ii) in any of the situations referred to in Paragraph (c) hereof with respect to which Producer reserves the non-exclusive right to perform the Compositions.

(3) That if the proprietor or licensee of any place capable of being licensed by the Society or one of its affiliated bodies fails or neglects to hold a license, as aforesaid, the right of the Society, or of the affiliated body concerned, shall be against such person exclusively.

(4) That, under no circumstances, shall the Society, or any of its affiliated bodies, or the Composer or any successor in interest of the Composer, or the publisher have the right to take any proceedings in respect of any unlicensed performance that would have the effect of enjoining and/or preventing and/or otherwise interfering with the public performance anywhere in the world and by any means

or method now or hereafter known of the motion pictures or any portion thereof or any trailer thereof with the Compositions included therein, nor shall the Producer or the publisher be liable to the Composer for any action that the Society or any of its affiliated bodies may or may not take in administering the Performing Rights or for any payments that the Society may or may not make to the Composer.

(5) That the Compositions need not be published as a condition of the payment of the publisher's share of performance fees.

(6) That neither the Producer nor the distributor nor the publisher shall, under any circumstances, be liable to the Composer or his successors in interest, or to the Society or its affiliated bodies, nor shall the Producer or the distributor be liable to the publisher, for any payment of any sums by reason of performance of the Compositions as contained in the motion pictures, or otherwise.

(7) That under no circumstances shall the Composer or his heirs, executors, administrators or other personal representatives, agents or assigns have the independent right to license performances of the Compositions as included in the motion pictures or trailers thereof, or to otherwise interfere in any way with the distribution and exhibition of such motion pictures containing the Compositions.

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(8) That if, after the transfer and assignment referred to in Paragraph (c) hereof, the Composer should resign from or cease to be a member or licensor of the Society, the Performing Rights in and to the Compositions involved shall, nevertheless, continue to be controlled and administered by the Society so long as the publisher remains a member of said Society; that if, after said transfer and assignment, the publisher should resign from, or cease to be a member or licensor of the Society or an affiliate of the Society, the Performing Rights in and to the Compositions involved shall, nevertheless, continue to be controlled and administered by the Society so long as the Composer remains a member of said Society; and that if, after said transfer and assignment, both the Composer and the Publisher shall no longer be members or licensors of the Society or the Society should cease to exist or function, then the Performing Rights in and to the Compositions involved shall revert to the Producer.

Notwithstanding the transfer and assignment referred to in Paragraph (c) hereof, it is agreed that the Publisher shall always have the right to transfer the Performing Rights acquired by it pursuant thereto to another publisher which is a member of the same Society, and the Producer shall always have the right to cause the Performing Rights to be transferred to another publisher which is a member of the same Society.

(c) That for the purpose of protecting the motion picture in which any Composition is used or to be used, the Producer or the Publisher shall always have the right to impose restrictions upon the performance of such Composition apart from such motion picture.

Article 12. *No Strike Clause*

The Guild agrees that during the term hereof it will not call or engage in any strike, slowdown or stoppage of work affecting motion picture production against the Producer.

The kind of strike referred to hereinafter in this paragraph is a strike called, either (a) pursuant to the written vote therefor of 66⅔% of the vote of active members of the Guild voting on the question at a meeting (called on at least two days advance written notice of the taking of a strike vote) or, in a mail vote; or (b) with the written assent of 66⅔% of the active members of the Guild without a meeting or mail vote.

If, after the expiration or other termination of the term of this contract, the Guild shall call a strike against any producer, then each respective then current employment contract of composer members of the Guild (hereinafter for convenience referred to as "members") with such Producer shall be deemed automatically suspended, both as to service and compensation, while such strike is in effect, and each such member of the Guild shall incur no liability for breach

of his respective employment contract by respecting such strike call, provided such member shall promptly, upon the termination of such strike, and on the demand of the Producer, perform as hereinafter in this paragraph provided, and the member shall be deemed to have agreed as follows:

(a) That if the composer has been assigned to the composition of the music or lyric for a motion picture at the time any such strike is commenced, he will, after the termination of such strike and upon the request of the Producer, report to the Producer and perform his services in the completion of such assignment at the same salary and upon the same terms and conditions as were agreed upon prior to the commencement of said strike.

(b) That he will immediately, after the termination of such strike and upon the request of the Producer, execute a new contract on the same terms and conditions, and at the same salary or other compensation as provided in the employment contract which was in effect at the time the strike commenced, except that such new contract shall be for a period or periods, including options, equivalent to the unexpired term of the contract which was in effect when such strike was commenced.

(c) That he will, in lieu of (b), after the termination of such strike, at the option of the Producer, and upon its demand, execute an agreement in writing

with the Producer extending the term or period of such personal service contract in effect when such strike was commenced for a period of time equal to any suspension by such strike.

If the member shall fail to perform the foregoing, or if he shall fail actually to finish his services in the assignment mentioned in (a), as provided in (a) (except by reason of his death, physical disability or default by the Producer), then the waiver of liability by the Producer heretofore given shall be null and void.

The member further agrees that the statute of limitations as a defense to any action by the Producer against the member for his failure to perform during such strike is extended by a period equivalent to the duration of such strike and the period of the strike shall not be considered a period of laches. If the member asserts any claim or defense by reason of the expiration of time during which he can be required to perform services by virtue of any statute (such as the seven year statute) which claim or defense is based in whole or in part on the lapse of time during such strike, the waiver by the Producer is ineffective thereupon, and the statute of limitations as to the Producer's rights is waived by the member automatically.

The automatic suspension provisions of this paragraph shall not affect the Producer's right to sue any individual composer for breach of contract arising during the period of such strike, unless such composer shall have complied with his obligations under the provisions of this paragraph.

Nothing herein contained shall be construed to deprive the Producer of its right to terminate the employment contract at any time after such member shall strike or otherwise fail or refuse to perform services.

The provisions of this paragraph shall be deemed included in all employment contracts between composers and Producer which are now in effect and all such employment contracts which shall be entered into during the effective term of this collective bargaining agreement.

The Guild agrees that it will take such affirmative actions as may be necessary and lawful in order to require its members to perform their respective obligations under the provisions of this paragraph.

Notwithstanding the expiration or other termination of the term of this collective bargaining agreement, by termination or otherwise, the provisions of this paragraph shall be and remain in full force and effect for a period of seven (7) years following the termination of any such strike, unless this covenant be sooner terminated by the written consent of Producer and Guild.

No officer, agent, director or member of the Guild shall be liable for any strike, slowdown or work stoppage, unless the same be authorized by the Guild in accordance with its by-laws. However, any officer, agent, director or member who affirmatively participates in, procures or induces the strike, slowdown or work stoppage, contrary to the terms of this agreement, shall not be immunized from liability by reason of the provisions of this Article. Provided, further

that the foregoing exemption of the first sentence above shall not apply unless the Guild upon request from the Producer affected thereby shall proclaim promptly and publicly that such strike, slowdown, or work stoppage is unauthorized, and follows such pronouncement within a reasonable time thereafter, if requested so to do by the Producer affected, with disciplinary proceedings in accordance with its by-laws against the participants in such unauthorized action.

Producer agrees it will not call or engage in any lockouts of members, during the term of this agreement.

Article 13. *Location Expenses*

If a composer is required by the Producer to perform services on any location sufficiently far away from the Producer's studio so that overnight accommodations are reasonably necessary, the Producer shall furnish and pay for the reasonable board and lodging of the composer while required to remain on any such location, and agrees to furnish for the composer first-class transportation, if available, to and from any such location, it being understood that such first-class transportation need not include a drawing room or compartment or passage on any so-called "extra fare" train, and the Producer may in any contract of employment between the Producer and a composer designate a reasonable daily maximum liability on the part of the Producer for such board and lodging of the composer.

In addition, Producer shall furnish at such location a musical instrument and such mechanical reproducing and

playback instruments as may be necessary or required in connection with his composition.

Article 14. *Conciliation Committee*

(a) The Producer and the Guild agree that prior to submitting to conciliation any matter properly a subject of conciliation hereunder, an authorized representative of the Guild and an authorized representative of the Producer will meet and in good faith attempt to settle and adjust the difference or dispute. If such representatives fail to settle or adjust the difference or dispute within seven (7) days after the matter has first been brought to the attention of the party not making the claim, such matter may be brought to the attention of the conciliation committee by either party hereto in the manner hereinafter described.

(b) Each Producer and the Guild will set up a Permanent Conciliation Committee consisting of six (6) members selected as follows:

(1) The Guild will promptly designate three (3) members in good standing and as soon as so designated, and in no event later than fifteen (15) days after the execution of this agreement, will in writing notify the Producer for which such committee is organized. The Guild may designate separate representatives for each Producer signatory, but need not do so.

(2) Each Producer will promptly designate three (3) representatives and as soon as so designated, and

in no event later than fifteen (15) days after the execution of this agreement, will in writing notify the Guild thereof. Each Producer signatory hereto may designate its own separate representatives or it may designate those named by any other Producer or Producers signatory hereto. The Producer and the Guild may, from time to time, make substitutions for any of their representatives by notice to the other party.

The Conciliation Committee will be maintained at all times during the life of this agreement. Promptly after the Committee has been constituted it shall select a chairman whose term of office shall be one (1) year. During the first year of the term hereof the chairman of the committee shall be a representative of the Guild and during the second year of the term hereof the chairman shall be a representative of the Producer, and the chairmanship shall alternate in like manner thereafter. If either party hereto desires to bring to the attention of the Conciliation Committee any matter properly a subject of conciliation he will serve upon the other party and the chairman of the committee a written notice thereof, which notice shall contain a statement of all matters to be submitted for consideration by the committee. The Chairman of the committee shall within forty-eight (48) hours (excluding Saturdays, Sundays and holidays) call a meeting of the committee by written notice served upon each of the members and shall allow a reasonable time, not to exceed fifteen (15) days, between the time of such

call and the time designated for such meeting. The date designated for such meeting may, however, be continued at any time or from time to time with the joint consent of the chairman, who shall be a representative of one of the parties hereto as aforesaid, and any one other member of the Committee who is a representative of the other party. The notice of call of any meeting issued by the chairman shall contain a statement of all matters submitted for consideration by the Committee and the Committee shall not consider or act on any unrelated matter or matters. The Committee shall meet as above provided, consider and act upon all matters properly submitted, and if a decision is concurred in by any five (5) members of the Committee the same shall be the decision of the Committee and shall be final and binding upon the parties to the proceeding. If the Committee shall fail to meet and commence hearings or deliberation upon any matter submitted to it upon the date designated as above provided for such meeting or within a period of fifteen (15) days from the time of such call, whichever is the later, or if five (5) members of the Committee shall fail to concur in a decision within fifteen (15) days after first hearing unless otherwise mutually agreed, or if hearing is waived by both parties hereto, after final submission of any matter, the Committee shall lose jurisdiction to act upon the matter so submitted. If the Committee shall lose its jurisdiction over any matter in the manner above provided, then either party hereto may submit such matter to arbitration. Such submission shall be made by written notice, requesting such arbitration, delivered to the other

party hereto, and in such event arbitration thereof shall be had in the manner hereinafter provided.

Article 15. *Matters Subject to Conciliation and Arbitration*

It is expressly understood and agreed that the following matters, and only the following matters may be submitted to the Conciliation Committee and thereafter to arbitration, as herein provided:

(a) Any difference between the Guild and the Producer concerning the interpretation of any of the terms of this agreement and its application and effect as determined by an interpretation hereof.

(b) Any alleged default or breach of any of the terms or provisions of this agreement on the part of either party hereto. It is agreed that neither party hereto shall, except before the committee and Board of Arbitration herein provided, claim a default or breach of any of the terms or provisions hereof on the part of the other party hereto or take any action of any nature at law, or otherwise, based upon or in reliance upon the commission or existence of such default or breach until the fact of such default or breach has been determined by a decision of the Conciliation Committee, or by arbitration, as hereinafter provided, in the event the Committee loses jurisdiction over the matter, and then only in the event the party found to have been in default fails to cure the same within the period designated therefor as hereinafter provided. If either party shall in writing notify the Committee or the Board, as the case may

be, or the other party to such conciliation or arbitration, that such party does not or will not honor or recognize, as to the alleged default or breach, the decision of the Committee or Board, then as to such party refusing to honor or recognize, the other party is relieved from the obligation to delay taking any action which it may desire. Likewise, if the Committee or Board shall formally decline jurisdiction, then each party is also relieved from the obligation to delay taking any action which it may desire. If the Committee or the Board of Arbitration hereinafter provided for shall find a default or breach of any of the terms or provisions of this agreement on the part of either party hereto it shall specify in writing the nature and extent of such breach or default and, if it finds that the default or breach can reasonably be cured, shall designate the manner in which such party, at its option, may cure such breach or default, and a reasonable time within which the party in default may cure such default and if such default is cured within the time so specified then for the purposes hereof such default shall be deemed not to have been committed and the party claiming such default may not take any action of any nature at law or otherwise in reliance upon the commission or existence of such default.

It is expressly understood and agreed that there is to be no conciliation or arbitration of any individual disputes between the Producer and any composer and that no determination or decision made by the Conciliation Committee or by arbitration, as herein provided, shall affect the rights of the Producer as against any composer or the rights of

any composer as against any Producer, but shall only control and be binding upon the Producer and the Guild in relation to their rights as against each other. Nothing herein contained shall require any Producer or any composer that are parties to a dispute with respect to or concerning any employment to submit such dispute to conciliation or arbitration hereunder of be construed so as to prevent immediate recourse to the courts by either party to such dispute. The decision of a court as to a controversy between a composer and the Producer shall not limit the power of the Conciliation Committee or Board of Arbitration to decide any related controversy between the Guild and the Producer that may properly be submitted to conciliation hereunder. The Conciliation Committee or Board of Arbitration may, in determining any dispute between the Guild and the Producer properly the subject of conciliation hereunder decide that a Producer or composer has violated the terms of this agreement in any transaction, but such decision shall not give the other party to such transaction any rights against the offending party. Neither the Conciliation Committee nor the Board of Arbitration shall have the power to declare any breach or default with respect to any contract of employment between the Producer and any composer. It is explicitly understood between the parties hereto that, in the event of any breach of the provisions of this agreement by Producer, which may also involve a breach of a contract of employment with one or more composers in the employ of the Producer, the Guild shall not have the right to submit to conciliation or arbitration here-

under any claim or demand of any such composer or composers against the Producer for damages, breach of contract, termination of contract or of any other nature whatsoever either as the agent, trustee, assignee or representative of such composer, or in any other capacity; but in such case the Guild shall nevertheless have the right to submit to conciliation and arbitration the claim of the Guild of a breach of the provisions of this agreement by the Producer, it being understood and agreed that the Guild shall have the right to conciliate and arbitrate a claim of the Guild of a default or breach by the Producer of any of the terms or provisions of this agreement regardless of whether or not such claimed default or breach may also involve a breach by the Producer of a contract of employment with a composer.

It is further acknowledged and agreed that in such circumstances:

(1) The fact that conduct of the Producer which is claimed to be a breach of this collective bargaining agreement shall also be claimed by a composer to constitute a breach of an individual contract of employment between the Producer and such composer, shall not preclude the Guild from seeking and obtaining arbitration hereunder with reference to the dispute between the Producer and the Guild;

(2) The fact that Producer's conduct constitutes a breach of an individual contract of employment shall not preclude the arbitrators from determining

that such conduct also constitutes a breach of Producer's obligations under this agreement.

Article 16. *Arbitration*

In the event of any arbitration hereunder a board of arbitration for the Guild and each Producer, consisting of three (3) members, shall be selected as follows: One arbiter shall be selected by the Guild and one arbiter shall be selected by the Producer. The third arbiter shall be chosen by mutual agreement of the two first selected, failing such agreement, by lot from an authorized list of eligible arbiters. Each Producer signatory hereto may designate its own arbiter or it may designate an arbiter named by any other Producer or Producers signatory hereto. Each party hereto shall designate its arbiter within seven (7) days after written notice of the loss of jurisdiction of the Conciliation Committee over the matter to be submitted to arbitration and the desire of the party serving such notice to submit such matter to arbitration. If either party hereto should fail to select its arbiter within the period above mentioned the other party may, at its option, treat such failure as a repudiation by such party so failing of the Board's jurisdiction to decide the matter or matters submitted, or may cause an arbiter to be selected for the party so failing, in the manner provided by the Code of Civil Procedure of the State of California. All arbiters may be interested persons but not personally or directly interested in the matter under dispute. The decision of a majority of the arbiters on any

subject herein permitted to be arbitrated shall be final and binding upon the parties to such arbitration.

Each party to this agreement shall pay his own costs of any conciliation proceeding and the Board of Arbitration shall have the right to assess the costs of an arbitration proceeding between the parties to such arbitration in such manner or in such proportions as the Board may deem proper, and in the event the Board fails to assess such costs the Producer or Producers party to such arbitration shall bear one-half (½) thereof and the Guild shall bear the remaining one-half (½) thereof. The Board of Arbitration and any Conciliation Committee above mentioned may make such rules of procedure and conduct their proceedings in such manner as they shall determine to be proper; provided, however, that in any event each party to any conciliation or arbitration shall be afforded a reasonable opportunity to present evidence and argument to the Committee or Board.

All hearings, deliberations and proceedings of the Board of Arbitration and of the Conciliation Committee hereinabove mentioned shall be closer to the public. Only members of the Guild and Producers signatory hereto and their authorized representatives or witnesses called may attend. All communications to and from the Board of Arbitration or the Conciliation Committee shall likewise be absolutely privileged.

The authorized list of arbiters approved by the parties hereto is as follows:

Ben Aaron
Professor Kingsley
Sheldon Elliot

Such list shall be revised by mutual consent from time to time until there are ten names on such list, and may be revised by mutual consent thereafter from time to time.

Article 17. *Minimum Compensation*

(a) Definition of a qualified composer and song writer:

(1) A qualified composer of underscoring is a composer who has screen credit for one feature length picture or 52 weeks of employment in the motion picture industry, as a composer of underscoring.

(2) A qualified song composer is a composer who has two published songs or who composed two separate songs each of which is completely contained in a motion picture produced and released in the American motion picture industry or who has had 52 weeks of employment in the American motion picture industry as a composer of either or both song music or song lyrics.

(b) *Wage Scale Minimum Compensation*

(1) There are no minimum compensation requirements with respect to unqualified composers.

(2) The minimum compensation for a qualified Composer for composition only, shall be:

Term contract: $325 per week.
Week to week: $350 per week.

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The above salary shall commence and apply when an assignment is made under the Producer's direction and control.

For these purposes, a term contract is a personal service contract for a term of at least ten out of thirteen weeks or any like ratio for a longer period. A week-to-week contract is a personal service contract for a term of less than ten out of thirteen weeks. A composer employed on a weekly basis, may be terminated at any time after one week.

If any composer under a week-to-week or term contract shall render services after the expiration of the period for which his specified compensation is provided in the employment contract and no additional amount is specified for such additional period, then in such event the composer shall receive the weekly rate specified in such contract for each week, or, for purpose only of prorating days worked in a partial work-week, (of less than six (6) days), one-fifth (1/5) for each such a day worked during which the composer shall render such additional services. In any week of employment when the Producer may under this agreement employ the composer for less than one full week (i.e. after one week or after the term of the agreement), if the composer shall render services in composition and also other services not covered by this agreement his minimum compensation for composition shall be prorated in proportion

to the amount of time required by Producer for composition.

Any amounts paid to the composer in excess of the minimum compensation, as provided above, may be applied to any other payments required under this agreement.

Article 18. *Recognition of Agreement*

The Guild agrees that it will take proper steps to provide that its by-laws carry this agreement into effect and that, during the term of this agreement, it will not maintain or adopt any articles or by-laws or any rules or orders which will be in conflict with this agreement. The Guild shall cause its by-laws to provide that each of its members shall be bound by the provisions of this agreement. The Guild represents and warrants that at all times during the term hereof it will have exclusive jurisdiction over the matters and procedures necessary to carry out the purposes and intent of the foregoing provisions of this Article 18 and over all other covenants and agreements to be kept or observed by the Guild pursuant to this agreement. The Producer will not either alone or in concert with any other Producer signatory to a similar agreement with the Guild take any action of any kind that will interfere with the performance of this agreement on the part of the Producer or violate the provisions of this agreement.

Article 19. *Agreement Binding Upon Whom*

This agreement shall be binding upon the Producer and its subsidiaries in which it has a fifty percent (50%) or more financial interest and all parties who by reason of mergers, consolidation, reorganizations, sale, assignment or the like shall succeed to or become entitled to a substantial part of the business of Producer.

Producer agrees to notify the Guild within seven (7) days after it executes an agreement with any person, firm or corporation (not covered by the provisions of the preceding paragraph) for the use of its studio for the production of a theatrical motion picture. Producer further agrees to notify the Guild within fourteen (14) days after it executes an agreement in the County of Los Angeles, California, with any person, firm or corporation (not covered by the provisions of the preceding paragraph) for the production, distribution or release of a theatrical motion picture where Producer's studio is not used for the production of such picture; such notice to the Guild shall contain the name and address of such person, firm or corporation as well as the name of the person who signed the agreement on behalf of such person, firm or corporation. An inadvertent failure on the part of the Producer to comply with the provisions of this paragraph shall in no event constitute a default by the Producer or a breach of this agreement.

Article 20. *Motion Pictures To Which Agreement Not Applicable*

It is understood that the provisions of this agreement shall not apply to newsreels, shorts, advertising shorts,

trailers, travelogues, commercial films or news of sports commentations.

Article 21. *Geographical Application of this Agreement*

Notwithstanding anything to the contrary herein contained, it is specifically understood that this agreement shall apply only to composers whose contracts of employment were executed within the continental limits of the United States (excluding Alaska) regardless of the place of performance of services thereunder and shall apply only to such contracts of employment.

Article 22. *Minimum Terms*

The terms of this agreement for the benefit of the composer are minimum terms; nothing herein contained shall prevent any composer from negotiating and contracting with any Producer for better terms for the benefit of such composer than are herein provided.

Article 23. *Producer-Composer Cooperative Committee*

Within fifteen (15) days after the execution of this agreement there shall be established a committee to be known as the Producer-Composer Cooperative Committee, composed of not less than sixteen (16) members representative of the Producer and the composer, eight (8) of whom shall be named by the Producer signatories hereto and eight (8) named by the Guild. It is understood that any group of seven (7) or more Producer signatories hereto may establish a separate committee for the purposes hereof, and

the Guild will name members to meet with each such committee. Such committee or committees shall meet at least once every sixty days. Deliberations shall be wholly informal and any and all matters affecting the operation and application of this contract, and the promotion of a harmonious Producer-Composer relationship shall be fully and freely discussed. Every effort shall in good faith be made by all members of the committee to prevent abuses from arising under this agreement, to eliminate inequities and to promote cooperation between and mutual understanding of the problems of employer and employee.

Article 24. *Jurisdictional Disputes*

The Guild agrees to cooperate in good faith with the Producer and with other guilds and organizations representing employees of the Producer in working out a method for the determination of jurisdictional disputes without work stoppages.

Article 25. *Pension Plan*

Producer and the Guild agree to immediately make application to become parties to, and if accepted, to be bound by the provisions of the "Motion Picture Industry Pension Plan" (hereinafter referred to as the "Pension Plan") made as of October 26, 1952, with respect to the employees covered hereunder.

In accordance with Article III, sections 2 and 3, of the Pension Plan and subject to the provisions of Article XV of such Pension Plan, relating to private retirement plans,

the Producer shall, for the period commencing with June 1, 1960, to and including January 30, 1961 pay into the Pension Plan a total of four dollars and thirty-two cents ($4.32) for each full workweek guaranteed an employee by such Producer or full workweek worked by an employee for such Producer in such period, under the terms of this agreement, excluding layoffs, suspensions or vacations, or eighty-eight cents (88¢) for each weekday worked or guaranteed in a fractional workweek; the Producer shall, for the period commencing with January 31, 1961, and for the balance of the term of this agreement pay into the Pension Plan a total of six dollars and twenty-one cents ($6.21) for each full workweek guaranteed an employee by such Producer or full workweek worked by an employee for such Producer on or after January 31, 1961, under the terms of this agreement, excluding layoffs, suspensions or vacations, or one dollar and twenty-seven cents ($1.27) for each weekday worked or guaranteed in a fractional workweek.

In accordance with Article III, sections 4 and 5, of the Pension Plan and subject to the provisions of Article XV of such Pension Plan, relating to private retirement plans, every employee covered by this agreement shall for the period commencing with June 1, 1960, to and including January 31, 1961, pay into the Pension Plan two dollars and seventy cents ($2.70) for each full workweek guaranteed such employee by Producer or for each full workweek such employee works for Producer during such period under the terms of this agreement; excluding layoffs, suspensions or vacations, or fifty-five cents (55¢) for each such weekday

worked or guaranteed such employee in a fractional workweek. Every employee covered by this agreement shall, for the period commencing with January 31, 1961, and for the balance of the term of this agreement pay into the Pension Plan three dollars and seventy-eight cents ($3.78) for each full workweek guaranteed such employee by Producer or for each full workweek such employee works for Producer on or after January 31, 1961, under the terms of this agreement, excluding layoffs, suspensions or vacations, or seventy-seven cents (77¢) for each such weekday worked or guaranteed such employee in a fractional workweek. On and after May 21, 1961, Producer shall deduct daily or weekly from the compensation of such employees, as the case may be, the amount of such contribution due from such employee, as above provided, which deduction shall be paid by Producer into the Pension Plan on behalf of such employee as the employee's contribution to the Pension Plan, as herein required.

The above contributions are in accordance with the present pattern of contributions by Employers and Employees required under the Pension Plan. In the event the present pattern of contributions under the Pension Plan should be changed during the term of this agreement, then the rate of contributions as provided herein shall automatically be changed to conform to such new pattern and rate of Employer and Employee contributions established under such Pension Plan.

Such money paid by Producer into the Pension Plan, shall not constitute nor be deemed to be wages due to the

individual employee subject to this agreement, nor shall said money paid into the Pension Plan, in any manner be liable for or subject to the debts, contracts, liabilities or torts of such employees.

Producer shall be obligated to make its contribution to the Pension Plan, for any such respective employee, as provided above, only as, if and when such respective employee has contributed to the Pension Plan the amount required from him, as provided above. In the event such employee does not pay to the Pension Plan by June 30, 1961, his contributions due for the period from June 1, 1960, to and including May 20, 1961, then the Producer shall not be liable or obligated to make its respective contribution to the Pension Plan for such employee for such period, as above provided.

Article 26. *Industry Pension Plan Retirees Health and Welfare Coverage*

Subject to the parties hereto becoming parties to the Industry Pension Plan as provided in Article 25 above, Producer shall pay into the Industry Pension Plan through its Administrator, as Agent for transmittal to the Industry Health and Welfare Fund, the following:

(a) For the period commencing with June 1, 1960, to and including January 31, 1961:

Eighty-one cents (81¢) for each full workweek guaranteed an employee by such Producer or full workweek worked by an employee for such Producer dur-

ing such period under the terms of this agreement, excluding layoffs, suspensions, or vacations, or sixteen and one-half (16½¢) cents for each such weekday worked or guaranteed in a fractional workweek.

(b) For the period commencing January 31, 1961, and for the balance of the term of this agreement:

One dollar and eight cents ($1.08) for each full workweek guaranteed an employee by such Producer or full workweek worked by an employee for such Producer on or after January 31, 1961, under the terms of this agreement, excluding layoffs, suspensions, or vacations, or twenty-two cents (22¢) for each such weekday worked or guaranteed in a fractional workweek.

The above contributions are in accordance with the present pattern of such contributions by employers to the Industry Pension Plan Administrator. In the event the present pattern of such contributions to the Industry Pension Plan should be changed during the term of this agreement, then the rate of contributions as provided herein shall automatically be changed to conform to such new pattern and rate of employer contributions as indicated by such Industry Pension Plan.

The money received by the Administrator of the Industry Pension Plan from such payment, as above provided, shall be kept separate and apart from any funds of the Industry Pension Plan, and shall be paid to the Industry Health and Welfare Fund upon demand by the Health and

Welfare Fund. The Health and Welfare Fund shall establish a special reserve fund into which such money shall be placed for the purpose of providing, under proper conditions, for such Health and Welfare coverage as the Trustees of the Health and Welfare Fund may determine to be appropriate for the employees retired under the Industry Pension Plan.

Such money paid by Producer to the Administrator of the Industry Pension Plan for transmittal, shall not constitute nor be deemed to be wages due to the individual employees nor shall said money so paid into the Industry Pension Plan, in any manner, be liable for or subject to the debts, contracts, liabilities, or torts of such employees.

Producer shall be obligated to make such contribution to the Administrator of the Industry Pension Plan for transmittal, for any such respective employee, as provided above, only as, and if such respective employee has contributed to the Industry Pension Plan the amount, and within the time required of him, as provided above in Article 25.

Article 27. *Significance of Titles and Sub-Titles*

The headings of Articles, sections and other subdivisions hereof are inserted for the purpose of convenient reference, and it is recognized that they may not adequately or completely describe the contents of the provisions that they head. Such headings shall not be deemed to govern, enlarge, limit, modify or in any other manner affect the scope,

meaning or intent of the provisions of this agreement or any part or portion thereof; nor shall they otherwise be given any legal effect.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed as of the day and year first above written.

PRODUCER

.....

By .....

COMPOSERS AND LYRICISTS GUILD OF AMERICA

By .....

Petitioners' Offer of Proof, Filed April 17, 1962

June 29, 1961

Allied Artists Productions, Inc.
Columbia Pictures Corporation
Walt Disney Productions
Metro-Goldwyn-Mayer Inc.
Paramount Pictures Corporation
Twentieth Century-Fox Film Corp.
Warner Bros. Pictures, Inc.

Gentlemen:

Reference is made to the Producer-Composers and Lyricists Guild of America Minimum Basic Agreement of 1960, executed as of June 1, 1960, between the Guild and each of the above Producers separately and respectively (each such agreement is herein referred to as the "Basic Agreement").

This is to confirm our understanding and agreement as follows:

The Guild desires to extend the date of June 30, 1961, as provided in the last paragraph of Article 25 of said Basic Agreement, to July 30, 1961.

The last paragraph of Article 25 of the Basic Agreement of 1960 is hereby amended to read in its entirety as follows:

> Producer shall be obligated to make its contribution to the Pension Plan, for any such respective employee, as provided above, only as, if and when such respective employee has contributed to the Pension Plan the amount required from him, as provided above. In the event such employee does not pay to

the Pension Plan by July 30, 1961, his contributions due for the period from June 1, 1960, to and including May 20, 1961, then the Producer shall not be liable or obligated to make its respective contribution to the Pension Plan for such employee for such period, as above provided.

If the foregoing accords with your understanding of our agreement, please so indicate in the space provided therefor below.

COMPOSERS AND LYRICISTS GUILD OF AMERICA

s/ By Leith Stevens

Accepted and approved:

Allied Artists Productions, Inc.
Columbia Pictures Corporation
Walt Disney Productions
Metro-Goldwyn-Mayer Inc.
Paramount Pictures Corporation
Twentieth Century-Fox Film Corp.
Warner Bros. Pictures, Inc.

s/ By Charles Boren

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IN THE

Supreme Court of the United States

October Term, 1962

SHENANDOAH VALLEY BROADCASTING, INC., *et al.*,
Appellants,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS TO DISMISS THE APPEAL OR TO AFFIRM

ARTHUR H. DEAN
WILLIAM PIEL, JR.
48 Wall Street
New York 5, N. Y.

HERMAN FINKELSTEIN
575 Madison Avenue
New York 22, N. Y.

LLOYD N. CUTLER
WILMER, CUTLER & PICKERING
Washington 6, D. C.

FREDERICK B. TERRY, JR.
SULLIVAN & CROMWELL
New York 5, N. Y.
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1962

No. 502

SHENANDOAH VALLEY BROADCASTING, INC., *et al.*,

Appellants,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS TO DISMISS THE APPEAL OR TO AFFIRM

Appellee, American Society of Composers, Authors and Publishers ("ASCAP" or the "Society"), moves pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States:

(1) to dismiss the appeal sought to be prosecuted by Shenandoah Valley Broadcasting, Inc., et al., from the judgment of the United States District Court for the Southern District of New York dismissing appellants' petition for music performing rights licenses, on the ground that the Expediting Act does not confer jurisdiction on this Court over this appeal, and, in the alternative,

(ii) to affirm, without further argument, the judgment of the District Court, on the ground that the Amended Final Judgment entered in 1950 in *United States v. ASCAP, et al.* (S.D.N.Y. Civ. No. 13-95) does not compel the Society to issue to appellants licenses of the type they are now seeking.

Questions Presented

The Society respectfully submits that only the following two questions are here genuinely raised:

1. When a consent judgment in an antitrust suit brought by the United States has created private rights for the benefit of numerous non-parties to the suit and has provided special rate-making proceedings in the District Court to implement such rights, must this Court, under the Expediting Act, entertain appeals by non-party applicants to review individual determinations made by the District Court in such incidental proceedings?

2. Does the Amended Final Judgment, which was entered in 1950 on the consent of the Society and the United States, empower the District Court, on motion of non-parties to the suit, to compel the Society to issue licenses of a type never before granted by it and nowhere prescribed in the provisions of that Judgment?

Statement

Before the organization of ASCAP, there was no effective method by which writers and publishers of music could secure payment for the use of their copyrighted musical works in public performances for profit. The users of music were so numerous and widespread, and each instance of use so fleeting, that no individual writer or publisher

could take the measures necessary to negotiate licenses with them or to detect unauthorized uses and secure legal redress. Conversely, music users who wished to perform thousands of works each year without risk of infringement had no practical means of obtaining licenses from the owners of all those works. As a means of solving the problems of both the copyright owners and the users of music, ASCAP was organized in 1914 as an unincorporated membership association representing both writers and publishers.

Today ASCAP has over 6,000 writer members and 2,000 publisher members, who grant to ASCAP non-exclusive rights to license the public performance of the copyrighted works that they have composed or published. Through the Society the works of its members are made available to over 30,000 enterprises located throughout the United States without the necessity of clearing each work separately. The Society's licensees include all the television and radio networks and over 500 commercial television stations and 4,000 radio stations. The television networks and almost all the television stations have elected to secure blanket licenses from the Society, enabling them to use all the works in the Society's repertory on any program they present without separately accounting for each use. These licenses obviate, for both the user and the copyright owner, the countless complex and expensive individual negotiations that would otherwise be required.

As set forth in the uncontroverted affidavit of Herman Finkelstein submitted in opposition to the order to show cause by which the proceedings below were commenced, the present type of blanket license held by appellants was painstakingly negotiated between the Society and the broad

casting industry in 1949 for the period 1949 through 1953 (A-6, R. 261).* That type of license was later renewed for the period 1954-1957, and again for the period 1958-1961 (A-7, A-8; R. 262).**

A substantial majority of the television stations (among whom are the petitioners, who operate 303 stations) and all the television networks in the United States have now collectively applied to ASCAP for licenses which are different from any prescribed in the Judgment and which would exclude from their coverage all programs pre recorded by others, production of which is commenced after February 28, 1962.

Under Section V of the Amended Final Judgment entered on March 14, 1950 in *United States* v. *ASCAP, et al.*, a manufacturer, producer or distributor of a transcription or recordation of a composition in ASCAP's repertory, which is recorded for performance on specified commercially sponsored radio or television programs, has the option of clearing through ASCAP the radio or television performing rights for the performance of such composition on stations enumerated by the license applicant, thereby eliminating the need for separate licenses for such performances by the enumerated stations (Appendix, p. 11a-13a; R. 33). If the Society were forced to grant to the television broadcasting industry licenses of the type ap-

* References to appellee's appendix attached to this motion are designated as "A- ;" references to appellants' appendix are designated as "Appendix, p. ;" references to the transmitted record are designated as "R. ."

** Of course, the District Court could take judicial notice of all prior proceedings in *United States* v. *ASCAP, et al.*, including the previous television rate proceeding brought therein in 1951, entitled *Matter of the Application of Voice of Alabama, Inc., et al.* *United States* v. *California Co-operative Canneries*, 279 U. S. 553, 555 (1929).

pellants now seek, the present option of independent program producers to "clear at the source" would be turned into a compulsion. Such producers inevitably would be compelled to pay for appellants' right to perform the music in pre-recorded programs.

Argument

This appeal should be dismissed or, in the alternative, the judgment of the District Court should be affirmed for the following reasons:

1. The Expediting Act does not confer jurisdiction on this Court to review determinations made in proceedings brought by non-parties to the suit solely under Section IX of the Amended Final Judgment.

2. The Amended Final Judgment does not compel the Society to grant appellants licenses of the novel type they are now seeking.

I.

The Expediting Act does not confer jurisdiction over this appeal.

Appellants were not parties to the action, *United States v. ASCAP, et al.*, in which the Amended Final Judgment was entered in 1950. Their standing in this proceeding is only as beneficiaries of that Judgment who were given certain privileges by its provisions. Among the privileges accorded to each appellant by that Judgment is the right to petition the District Court under Section IX for the determination of a reasonable fee to be paid to the Society for a performing rights license in the event that an applicant and the Society cannot agree upon a fee (Appendix, pp. 16a-18a; R. 36-38).

Appellants claim they are entitled to a direct appeal to this Court under the provisions of the Expediting Act* from a determination by the District Court that the Society cannot be compelled under the Amended Final Judgment to issue licenses of the type that appellants now seek.

The United States is the "complainant" in this proceeding only in the technical sense that it brought the original action in which the Amended Final Judgment was ultimately entered. The present proceeding was not brought by the United States to carry out or amend the provisions of that Judgment. Nor has the United States appealed from the order and judgment entered below.

The purpose of the Expediting Act is to expedite the final resolution of cases brought by the United States under certain statutes prohibiting conduct that threatens vital public interests. During consideration of the bill that became the Expediting Act, this objection was made clear by Senator Fairbanks, who explained the purpose of the bill on the Senate Floor when he reported it out of the Committee on the Judiciary:

> "The far-reaching importance of the cases arising under anti-trust laws now upon statute books or hereafter to be enacted, and the general public interest therein, are such that every reasonable means should be provided for speeding the litigation. It is the purpose of the bill to expedite litigation of great and general importance. It has no other object." 36 Cong. Rec. (Part II) 1670 (1903).

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* Section 2 of the Expediting Act provides:

> "In every court action brought in any district court of the United States under [the antitrust laws], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court." 32 Stat. 823 (1903), as amended, 15 U.S.C. §29 (1952).

If this appeal can be taken under the Expediting Act, ASCAP and any and all of its more than 30,000 licensees can appeal directly to this Court from any determination of a license fee or a form of license made by the District Court under the Amended Final Judgment. Review of any such determination would inevitably require detailed consideration of massive amounts of technical data pertaining to, for example, the amount, type and identity of music used by the licensee and its importance in the licensee's operations. The Expediting Act does not contemplate that the energies of this Court be expended on matters of such great technical complexity and of such limited public interest.

In support of their assertion that this Court has jurisdiction over this appeal, appellants rely on *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502 (1941); *Hughes* v. *United States*, 342 U. S. 353 (1952); *United States* v. *California Cooperative Canneries*, 279 U. S. 553 (1929); and *Sam Fox Publishing Co.* v. *United States*, 366 U. S. 683 (1961). With the exception of *Hughes* v. *United States*, *supra*, these cases all involved an order denying a motion to intervene in a Government antitrust suit where the appealing party claimed intervention as a matter of right.

An order denying intervention to one entitled as a matter of right to intervene in a Government antitrust suit is wholly different from a license fee determination made by the District Court under the Amended Final Judgment. The granting of intervention in a Government antitrust suit makes the intervenor a party to the action itself, enabling him to present his views as to the merits of the claims and defenses or, if the action was or is to be resolved by consent, the form and adequacy of the relief to

be embodied in the judgment. In contrast, the only right accorded to appellants and other ASCAP licensees under Section IX of the Amended Final Judgment is a judicial determination of a reasonable license fee. The exercise of that limited right does not involve the considerations of great public interest for which the Expediting Act was intended.

Appellants' reliance on *Hughes* v. *United States*, 342 U. S. 353 (1952), is wholly misplaced, since that direct appeal to this Court was taken by the defendant and it challenged a construction of an antitrust decree that resulted from a motion made by the Government, not by a third party.

II.

The judgment of the District Court should be affirmed.

If this Court does not dismiss this appeal, it should affirm, without further argument, the judgment of the District Court dismissing appellants' petition.

This appeal does not raise a substantial question warranting further consideration by this Court. It represents only an attempt by certain ASCAP licensees, who were not parties to *United States* v. *ASCAP, et al.*, to impose new obligations on ASCAP that are nowhere prescribed or contemplated by the Amended Final Judgment.

The Amended Final Judgment does not require ASCAP to offer licenses of the type now demanded by appellants. The District Court properly rejected the attempt by appellants—ASCAP licensees who were not parties to *United States* v. *ASCAP, et al.*—to seek, in the guise of a fee determination, modification of the Judgment so as to impose new obligations on ASCAP.

As the District Court properly observed in its opinion of September 14, 1962:

> "Petitioners were not parties to the [Amended Final] judgment; they have petitioned only as beneficiaries under it and they may not under cover of the protection from discrimination afforded them under its provisions indirectly effect an amendment to that judgment so as to wrest from ASCAP a type of license it is now under no judicial compulsion to grant. Here we do not have a petition for modification of the consent judgment filed by a party to the judgment". (Appendix, p. 6a; R. 1354).

The Judgment imposes both restraints and obligations on ASCAP with respect to the licensing of its repertory. Some of the provisions prohibit certain types of conduct; other provisions contain affirmative directions to ASCAP. No provision, however, compels ASCAP to issue licenses of the type appellants are now seeking (for a detailed discussion of the licensing provisions of the Judgment, see *infra* at 12-18).

Appellee submits that the real objective of the appellants is to persuade this Court, in a proceeding brought solely under Section IX of the Amended Final Judgment, to modify and amend that Judgment so as to impose on ASCAP an entirely new obligation. But appellants are no more entitled to bring about a modification of the Judgment in this proceeding than are individual ASCAP members, who have been held not entitled to intervene in proceedings to amend the Judgment. *Sam Fox Publishing Co. v. United States*, 366 U. S. 683 (1961). The Judgment itself provides that only the United States and ASCAP may apply to the Court for the modification thereof (Appendix,

pp. 22a-23a; R. 41). *Cf. United States v. Radio Corporation of America*, 180 F. Supp. 770 (E.D. Pa. 1960), *appeal dismissed sub nom. Westinghouse Broadcasting Co. v. United States*, 364 U. S. 518 (1960); *United States v. Loew's Inc.*, 130 F. Supp. 13 (S.D.N.Y. 1955).

Appellants' objective is made clear by their repeated reliance on the 139-page offer of proof set forth in their appendix (Appendix, pp. 37a-175a; R. 953-1019; appellee also submitted, conditionally, its offer of proof, R. 1020-1306). This offer of proof, which was properly excluded by the District Court, contains lengthy allegations that are wholly apart from the language of the Judgment, which provides the only basis for this proceeding and which defines the rights of the appellants and the duties of the appellee.

When a decree is entered on the consent of the parties without trial or adjudication of any issue of fact or law, courts will not go outside the language of the decree in a sweeping search for some alleged underlying purpose of the suit in order to carry out the decree in a manner that might effectuate that claimed purpose. No issues have been adjudicated, and the decree is not ancillary to findings whose purpose is to be effectuated. The language of the decree is itself controlling and the only restraints and obligations imposed upon a defendant are those set forth in the decree.

Thus, in *Hughes v. United States*, 342 U. S. 353 (1952), involving a consent decree that provided specific treatment for Howard Hughes' stockholdings in two new companies to be formed from R.K.O., this Court said:

> "It may be true as the Government now contends that Hughes' large block of ownership in both types of companies endangers the independence of each. Evidence might show that a sale by Hughes is indispens-

able if competition is to be preserved. However, in section V the parties and the District Court provided their own detailed plan to neutralize the evils from such ownership. Whatever justification there may be now or hereafter for new terms that require a sale of Hughes' stock, we think there is no fair support for reading that requirement into the language of section V. The District Court's order cannot be supported by reliance on such an interpretation. Consequently the court's command to sell the stock effected a substantial modification of the original decree." 342 U. S. at 357.

In *United States* v. *Atlantic Refining Co.*, 360 U. S. 19 (1959), as in *Hughes*, the Government asked the Court to interpret a consent decree in a manner which, arguably, would have effectuated the underlying purpose of the action, but which was not supported by the language of the decree. This Court rejected this interpretation, stating:

> "The Government contends that the interpretation it now offers would more nearly effectuate 'the basic purpose of the Elkins and Interstate Commerce Acts that carriers are to treat all shippers alike.' This may be true. But it does not warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issues [footnote omitted]. And we agree with the District Court that accepting the Government's present interpretation would do just that." 360 U. S. at 23.

Appellants seek to rely on *Swift & Co.* v. *United States*, 276 U. S. 311 (1928), but that decision provides no support for their contentions since it stated, in relevant part, only that the provisions of the consent decree there in issue were "to be read in connection with other paragraphs of the decree and with the allegations of the bill." *Id.* at 328. Here appellants can point to no provision in the Amended

final judgment, or even to any allegation in the 1941 complaint, that supports their asserted reading of the judgment.

Appellants' attempts to invoke "block booking" decisions such as *United States v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948), and *United States v. Loew's, Inc.*, 31 U.S.L. Week 4001 (U. S. Nov. 5, 1962), are equally futile. In complete contrast to the "block booking" victims in those cases, music users who desire a license for one or more specified compositions in the ASCAP repertory may negotiate for them directly with the individual members of ASCAP. In fact, ASCAP is barred under Section VI from issuing licenses for individual copyrights except in the very limited circumstances there described (Appendix, p. 14a; R. 35).

Moreover, appellants themselves now seek licenses to perform *all* of the compositions in the ASCAP repertory. Thus there is no merit whatsoever to appellants' claim that their present ASCAP licenses violate Section IV(B) of the Judgment by limiting or restricting the rights of ASCAP members to license their works individually.

A. The Amended Final Judgment does not require ASCAP to issue the licenses sought by appellants.

A reading of the Amended Final Judgment shows plainly what its scheme is: ASCAP is required to offer licenses for its entire repertory to all commercial classes of music users. ASCAP is required to grant certain types of licenses to certain particular classes of users. ASCAP is prohibited from granting other types of licenses to certain particular classes of users. If ASCAP elects to offer a particular type of license to one member of a user class, it is pro-

inhibited from granting the same type of license to another member of the same class; similarly, should ASCAP may offer to a class of users more than one type of license. If ASCAP offers the same class of user two or more types of licenses, it must use its best efforts to offer rates that would not deprive an applicant of a genuine economic choice among the types offered.

ASCAP is *not* required to issue hundreds, or not thousands, of different types of licenses, each differing in its terms depending on the particular demands of each licensee. ASCAP is *not* required to propose a license whatever license terms each individual applicant may see fit to request.

The provisions of the judgment relating to the licensing of the ASCAP repertory are simple in structure.

• Provisions for Compulsory Licensing

Section VI requires ASCAP to license its repertory to all users (Appendix, p. 14a; R. 41).

Sections V and VII(B) enumerate certain types of licenses that ASCAP is required to grant to certain types of users.

> Section V requires ASCAP to grant licenses at the source, under certain clearly stated conditions, at the request of (1) radio and television networks, (2) wired music services, (3) manufacturers, producers or distributors of transcriptions or recordations intended for radio and television broadcasting, and (4) motion picture producers (Appendix, pp. 11a-14a; R. 33-34).

Thus Section V provides an *option* for program producers to acquire television performing rights from ASCAP. The licenses sought by appellants would be clearly inconsistent with this provision because their inevitable effect would be to turn this option into a compulsion by forcing producers to obtain television performing rights.

Section VII(B) requires ASCAP, at the request of a radio or television station, to grant "per program" licenses in which the fee is based on the station's revenues or card rates for "*each*" program containing ASCAP music, whether or not the program consists of pre-recorded materials (Appendix, pp. 15a-16a; R. 35-36).

None of the types of licenses enumerated in Sections V and VII(B) is the type that the appellants are now requesting.

Provisions Prohibiting Discrimination

Sections IV(C) and VIII prohibit discrimination.

Section IV(C) prohibits ASCAP, in offering licenses that the Judgment requires it to offer or that it may elect to offer, from discriminating in "license fees or other terms and conditions between licensees similarly situated" (Appendix, p. 10a; R. 31).

Section VIII directs ASCAP in fixing fees for the various types of licenses that the Judgment requires it to offer or that it may elect to offer, "to use its best efforts to avoid any discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of

a genuine choice from among such various types of licenses" (Appendix, p. 10a; R. 30).

Sigmund Timberg, who represented the Government in negotiating the Amended Final Judgment, observed with respect to Section VIII:

> "Fifth, Section VIII of the Amended Consent Judgment in effect requires ASCAP to use its best efforts to give licensees a genuine choice from among various types of licenses *offered by it.*" (Emphasis added.) Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 Law & Contemp. Prob. 294, 310 (1954).

Nowhere did Mr. Timberg suggest that Section VIII imposes a duty on the Society to offer any particular type of license, much less a duty to accept whatever terms and arrangements might be devised and requested by a license applicant.

Provisions Restricting Licensing Terms

Sections IV and VII(A) contain certain restrictions on the terms ASCAP may include in its licenses. Some of these restrictions apply to all licenses; others apply only to licenses to particular classes of users.

Section IV(D) prohibits ASCAP from granting any license of more than five years' duration, except for motion picture performance rights licensed at the source pursuant to Section VI(C) (Appendix, p. 10a; R. 31-32).

Section IV(E) prohibits ASCAP from licensing motion picture performance rights to any motion picture theatre exhibitor (Appendix, p. 10a; R. 32).

Section VII(A) prohibits ASCAP from issuing any license to a radio or television broadcaster in which the fee, in the case of commercial programs, is based upon a percentage of the income received by the licensee from programs which include no ASCAP compositions, unless the radio or television broadcaster to whom the license shall be issued desires such a license (Appendix, p. 15a; R. 35). Section VII(B)(3) makes it clear that such a license is the "blanket license" referred to by the Judgment (Appendix, p. 16a; R. 36).

Appellants do not contend that the licenses offered by ASCAP violate any of these restrictions.

Provisions for Fixing Fees

Section IX provides for the case where ASCAP and an applicant cannot agree on the fee for one of the types of licenses which the Judgment requires ASCAP to offer or which ASCAP may have elected to offer. This section provides that, upon application, ASCAP shall quote a fee "for the license requested" and that, if the parties are unable to agree, the applicant may apply to the court to fix the fee (Appendix, pp. 16a-18a; R. 36-38).

> The phrase "the license requested" means the license for the type of use of the Society's repertory that the applicant intends to make, not the particular and varying contract terms that each of the Society's more than 30,000 licensees might see fit to request. Thus a license may be requested for the use of "wired music", or for music in a hotel, or for roller skating rinks, taverns or concert halls—or for radio or television broadcasting.

The "license requested" also refers back to the phrase "any, some or all of the compositions in the ASCAP repertory", which appears earlier in the sentence. Under Section VI, an applicant can apply to ASCAP for a license to perform "all of the compositions in the ASCAP repertory" or, in certain circumstances, for a license to perform "one or more specified compositions in the ASCAP repertory" (Appendix, p. 14a; R. 35).

Appellants argue, however, that they are seeking either a "blanket license" or a "per program license" within the meaning of the Judgment and that ASCAP is obligated under Section VII of the Judgment to issue the type of license they request.

There are several fatal defects in this argument. Section VII(A) states merely that ASCAP is enjoined from issuing blanket licenses "unless the radio broadcaster or telecaster to whom such license shall be issued shall desire [such] a license . . ." (Appendix, p. 15a; R. 35).

When the Judgment wanted to command ASCAP to issue a particular type of license, it knew how to do so, as illustrated by Section VII(B). In Section VII(B), ASCAP is *"ordered and directed"* to issue "to any unlicensed radio or television broadcaster . . . per program licenses . . ." (Appendix, p. 15a; R. 35). (Emphasis added.) The "per program license" that ASCAP must issue under this provision is a license requiring payment for *"each"* program in which ASCAP compositions are performed, whether or not the program is made up of pre recorded materials.

The words "ordered and directed" do not appear anywhere in Section VII(A). However, even if Section VII(A) could be construed to require that ASCAP issue blanket licenses to telecasters who desire them, it does not refer to licenses of the type appellants now seek. Section VII(A) refers to licenses for which the fee is based on revenues from all programs, including those that do not contain compositions within the ASCAP repertory. The blanket license now held by each appellant bases its fee on all locally-emanating programs (as distinguished from network-emanating programs, which are cleared at the source pursuant to Section V(A)), whether or not they contain ASCAP music and whether or not they are "live" or pre-recorded.

Thus the existing blanket and per program licenses are precisely the types of licenses referred to in Section VII, as Mr. Timberg recognized:

> "The 1941 ASCAP Decree was, as far as ASCAP's relations with music users were concerned, largely confined to stating, in legal injunctive language, some of the ground rules which were to govern the prices and other terms and conditions under which radio stations were to be licensed to use ASCAP music. The standard 'blanket' and 'per program' licenses, and the schedule of payments originally negotiated between ASCAP and the radio industry on the basis of their 1941 concordat, were still accepted by both sides in 1950. Hence, with the exceptions noted in this section, the radio broadcasting provisions of the old decree were carried over substantially unchanged into the new." Timberg, *supra*, at 307.

Nothing in Section VII, even if it can be read to require ASCAP to grant blanket licenses to appellants,

commands that such licenses be of the type appellants now request—*i.e.*, covering only some of the locally emanating programs that contain ASCAP music and excluding other locally emanating programs that contain ASCAP music even though licenses for those other programs have not been issued by ASCAP under Section V(B) to the producers thereof.

B. The provisions of the Amended Final Judgment occasioned by the *Alden-Rochelle* decision apply only to theatre exhibition of motion pictures.

In support of their construction of Sections VI and IX, appellants claim that the conclusions reached in *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888, *modified*, 80 F. Supp. 900 (S.D.N.Y. 1948), which were before the District Court when it entered the Amended Final Judgment in 1950, are equally applicable to the licensing of pre-recorded material for broadcast by television stations. Appellants, under the guise of seeking construction of the Judgment, argue that the solution adopted by the Judgment for the licensing of motion picture performance rights for exhibition in theatres should now be applied to the telecasting of pre-recorded materials.

The judgment entered in the *Alden-Rochelle* action was vacated on March 14, 1950, at the time of the entry of the Amended Final Judgment, which completely superseded the *Alden-Rochelle* judgment. Specific language was set forth in the Amended Final Judgment to take account of the practices at issue in *Alden-Rochelle*.

Thus, for example, under Section V(C) ASCAP is required to issue, upon request, "to any person engaged in producing motion pictures . . . a single license of motion

picture performance rights covering the United States, its territories and possessions, without requiring further licenses" (Appendix, p. 13a; R. 33).

Section IV(B) of the Judgment prohibits ASCAP from granting licenses for motion picture performance rights to "any motion picture theatre exhibitor" (Appendix, p. 10a; R. 32). Significantly, this section makes no mention of any prohibition against licensing television stations to telecast films or other pre-recorded material.

It is clear from the *Alden-Rochelle* opinion, underlying this language of the Amended Final Judgment, that the motion picture performance right referred to in the Judgment consisted of the right to perform musical works in motion picture theatres, and did not relate to the completely different medium of public communication and entertainment represented by the telecasting of pre-recorded program materials.

The term "motion picture performance right", as defined in Section II(C) of the Amended Final Judgment, was limited to the "exhibition" of motion pictures in motion picture theatres, as the specific mention of motion picture theatres in other parts of the Judgment clearly shows. Thus, although television was well established in 1950, and although the Judgment expressly took account of this medium (see, *e.g.*, Sections VII and V(B)); nothing in the Judgment prevents ASCAP from licensing to telecasters the performing rights for works that are pre-recorded in motion pictures, television film series or other program materials. Appellants have concurred in this construction of the Judgment for a dozen years by demanding, receiving, and paying ASCAP for the right to telecast the music contained in such pre-recorded materials.

CONCLUSION

The Court should grant the motion of appellee, American Society of Composers, Authors and Publishers, to dismiss the within appeal or, to affirm the judgment of the District Court without further argument.

Respectfully submitted,

ARTHUR H. DEAN
WILLIAM PIEL, JR.
48 Wall Street
New York 5, N. Y.

HERMAN FINKELSTEIN
575 Madison Avenue
New York 22, N. Y.

LLOYD N. CUTLER
WILMER, CUTLER & PICKERING
Washington 6, D. C.

FREDERICK A. TERRY, JR.
SULLIVAN & CROMWELL
New York 5, N. Y.
Of Counsel

December 13, 1962

APPENDIX

Affidavit of Herman Finkelstein

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 13-95

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Defendant.

In the Matter of the Application of

SHENANDOAH VALLEY BROADCASTING, INC., et al.

Petitioners,

For the Determination of Reasonable License Fees.

HERMAN FINKELSTEIN, being duly sworn, deposes and says:

1. I am General Attorney of the American Society of Composers, Authors and Publishers and make this affidavit in opposition to the proposed order described in the Court's Order to Show Cause served on December 19, 1961 and in support of Respondent Society's proposed Interim Fee Order.

Affidavit of Herman Finkelstein

2. This affidavit will set forth facts showing (a) the Society's practice since 1945 of soliciting television performing rights from its members on a conditional basis and for limited periods of time; (b) the recent negotiations between the Society and the Petitioners; and (c) that the receipt of further authorizations from members to license television rights and the deposit of all such authorizations with the Society on an unconditional basis have rendered moot the relief sought by Petitioners' Order to Show Cause.

History of the Society's Solicitation of Television Rights from Members

3. At the Hearing this morning counsel for Petitioners stated that the Society had solicited television rights from its members on a conditional basis in order to be in a position to frustrate their rights under Section IX of the Amended Final Judgment.

The facts are to the contrary. The practice of which Petitioners complain originated in 1945, five years before the entry of the Amended Final Judgment. The reasons for the practice are summarized below.

4. In 1941, as part of a settlement of a dispute between the Society and the broadcasting industry, the Society granted a gratuitous license for television, to the extent, if any, that it then had television rights from its members. The extent to which it had such rights was not clear at that time.

5. In 1945, when the television industry was about to embark on a new phase in its development, the Society's Board of Directors adopted a resolution directing the Society's management to send a separate form of agreement to members granting television rights to the Society. That resolution provided that the Society's management was to

> "hold in escrow all such agreements signed by members of the Society until the writer members who have signed and delivered such agreements and the publisher members who have signed and delivered such agreements represented eighty percent (80%) of the total amount of the Society's distribution of domestic royalties for the calendar year 1944 to writer members and publisher members, respectively, at which time such agreements shall become in full force and effect as to all members who shall have signed and delivered the same."

A copy of a letter dated December 12, 1945 from the Society to the members, referring to the fact that the agreement would not become effective until 80% of the members signed it, is annexed hereto as EXHIBIT "A".

The agreements were sent to the members in anticipation of negotiations with the television broadcasters for license agreements to replace the existing gratuitous licenses. These negotiations did not materialize and the gratuitous license continued in effect until December 31, 1948.

The reasons for obtaining these separate authorizations from members relating to television rights, and for limiting the grants of such rights to a term much shorter than

that applicable to other rights, were and are rooted in the distinctions between the nondramatic performing right and the dramatic rights under the copyright laws, and in the economics of the entertainment industry. The type of use that may be made of the members' works on television under the nondramatic performing right is very closely akin to the dramatic rights which the members reserve for individual licensing. For this reason, the extent to which the collective licensing of the nondramatic performing rights by ASCAP may impinge upon and restrict the dramatic rights reserved by the members for individual licensing is one that the members feel they should be able to supervise more closely and review more frequently than the exercise of other rights entrusted to the Society.

6. On December 1, 1948, the Society notified all of its television licensees that, in view of the fact that the television industry had passed from the experimental to the commercial stage of its development, the gratuitous licenses would be terminated effective December 31, 1948. Recognizing that it might take some time to work out a license agreement, the Society proposed that if no agreement were reached by January 1, 1949, it would continue to authorize performances of its works for a 60 day period with the understanding that any agreement reached within 60 days after January 1, 1949 would be retroactive to that date. If no agreement was reached within the 60 day period the Society agreed to waive its right to collect for performances on television during that period, which would be regarded as having been authorized under a gratuitous license.

Affidavit of Herman Finkelstein

At this time, there were wide differences of opinion among the membership as to the scope and duration of the rights that should be granted to the Society. Accordingly, the Board determined to solicit rights for a period of only two years, and also to exercise the rights only if a sufficient number of members granted rights to make licensing through ASCAP feasible. For this purpose the Board advised members that individual grants of rights would only be effective if members representing at least 80% of the Society's revenues were willing to give such authorizations.

In anticipation of the forthcoming negotiations with the television industry, the Society, on October 8, 1948, sent to all members a form of television agreement for the period ending December 31, 1950. That agreement was sent pursuant to a resolution of the Society's Board of Directors that

> "... [T]he president hold in escrow all such agreements signed by members of the Society until the writer members who have signed and delivered such agreements and the publisher members who have signed and delivered such agreements represent eighty percent (80%) of the total amount of the Society's distribution of domestic royalties during the calendar year 1947 to writer members and publisher members respectively, at which time such agreements shall become in full force and effect as to all members who shall have signed and delivered the same."

A copy of the letter forwarding the agreement to the members, which sets forth the above resolution, is annexed hereto as EXHIBIT "B".

This agreement provided for an assignment of performing rights limited to instrumentalists or to a group of vocalists not exceeding five and, in general, to performances without costume or scenery.

7. During 1949, the Society negotiated with the television broadcasters and the 60-day period referred to above was extended from time to time. During these negotiations, the broadcasters advised the Society that the grant of rights which it had obtained from its members was too narrow. They were not interested in obtaining a license on the basis proposed by the Society.

8. In October 1949, the Society and representatives of the television networks agreed upon a form of license agreement for television networks. The grant of rights provided for in that agreement was considerably broader than the grant which the Society then had from its members. It was, therefore, necessary for the Society to obtain a new grant from its members.

The television networks and the Society entered into an escrow agreement dated October 17, 1949 which provided for payment of 25% of the license fees in escrow and that the license would not become effective until the Society received television agreements from 85% of its publisher members (including all members of the Board of Directors) and 80% of the writer members, and an aggregate of 85% of all members. The Society was also required to deliver a letter granting an assignment of kinescope recording rights from the publisher members who had granted the television performing rights to the Society.

The escrow agreement provided that the monies deposited in escrow be paid to the Society when the license agreements became effective, but that if the Society did not have the required assignments from its members by December 31, 1949, either the Society or the television network had the right to terminate the escrow agreement on thirty days' notice to the other party, in which event the monies deposited in escrow were to be returned to the television network together with copies of the license agreements marked "Null and Void". A copy of the form of Network Effective Date Letter dated October 17, 1949 setting forth the escrow agreement is annexed hereto as EXHIBIT "C".

9. The practice of depositing television assignments with the Society in escrow, which was instituted in 1945 and repeated in 1948, was continued for each successive assignment of television performing rights. Thus, on May 1, 1953, forms of extension agreement were sent to the Society's members covering the period expiring December 31, 1957. These agreements were submitted to the Society's members pursuant to a resolution of the Society's Board of Directors providing that the agreements would be held in escrow until they had been executed by 80% of the members (in terms of royalties).

A copy of the letter forwarding the agreement to the members, which sets forth the resolution, is annexed hereto as EXHIBIT "D".

10. On November 1, 1956, the Society's members were asked to extend the prior television agreements with the

Society for the period expiring December 31, 1961. The forms of extension agreement were sent to the members pursuant to a resolution of the Society's Board of Directors providing for the same escrow arrangement.

A copy of the letter forwarding the agreement to the members, which sets forth the resolution, is annexed hereto as EXHIBIT "E".

11. The Society's letter of August 4, 1961, which the Petitioners claim is designed to frustrate their rights under Section 9 of the Amended Final Judgment, is thus in all respects the same as the prior letters forwarding television agreements to the members (e.g., Exhibits "D" and "E"). A copy of that letter is annexed hereto as EXHIBIT "F".

THE SOCIETY'S RECENT NEGOTIATIONS WITH PETITIONERS

12. As indicated above, the Society sent to its members on August 4, 1961 an extension of the existing television agreements. The usual practice was followed, namely, that the members were advised that their agreements would be held in escrow until 80% of the writer and publisher members, on a revenue basis, had deposited their agreements. At that time, the Society had no knowledge of the fact that Petitioners intended to demand a license on a completely new basis.

It was not until October 18, 1961 that Petitioners wrote a letter to the Society presenting their demands. This letter requested a "blanket" license limited only to the relatively

small number of programs which each station originates locally, and excluding programs originally filmed or taped by third party producers. As to such filmed or taped programs produced after February 28, 1962, the letter proposed that ASCAP itself assert no right to license, and that ASCAP's members should individually license the performance of their works in such programs directly to the producers concerned.

13. In subsequent meetings the ASCAP representatives stated that this proposal would cause serious economic injury to ASCAP's members and was not an acceptable basis for negotiations. They explained that it would not be in the best interests of ASCAP's individual members to grant television rights to ASCAP under circumstances where ASCAP might be required to license all of their works for a few local television programs, while they themselves would be required to license some of the same works directly to film and tape producers of the great majority of local television programs. They pointed out that if members are to be required to license their works individually for some television purposes, it would be in their interest to do so for all television purposes, rather than to divide the licensing responsibility between themselves and ASCAP.

Furthermore, the ASCAP representatives pointed out that in licensing their works individually to producers of filmed and taped shows, ASCAP's members would be at a hopeless disadvantage in competing against Broadcast Music, Inc. collectively owned and controlled by the broadcasters; that BMI has amassed rights to a large quantity

of music suitable for such purposes by offering large financial inducements to selected writers and publishers; that BMI would remain free to license collectively the works it has amassed, and, that BMI, instead of collecting fees *from* producers for using its works, as ASCAP members would have to do, would be able to continue its present policy of offering substantial long term guaranteed payments *to* producers who agree to use BMI music exclusively or in specified percentages in their shows.

RECEIPT OF FURTHER AUTHORIZATION MAKES THE RELIEF REQUESTED IN THE ORDER TO SHOW CAUSE UNNECESSARY

14. Throughout the four-year duration of the present license, Petitioners well knew that ASCAP's grants of television rights from its members would expire on December 31, 1961. I am informed and believe that Petitioners' Committee has been in existence for over a year. Yet Petitioners chose not to make their request for the radically different partial license for only a small portion of their local programs until October 18, 1961, only ten weeks before the end of the present license term.

15. As a result of Petitioners' unexpected demand for a license covering only a small portion of their local programs, a number of ASCAP members delayed the execution of their authorizations of television rights for the 1962-1966 period, because of their unwillingness to permit ASCAP to agree to license their catalogues on this basis. However, now that Petitioners have placed the issue of

their right to obtain such a license under the Amended Final Judgment before this Court for adjudication, the Board of Directors of ASCAP has made a further request to all members that they deliver their 1962-1966 authorizations to ASCAP so that ASCAP will be able to have this issue definitively resolved by the Court in such a way as to bind all parties. Authorizations from members representing more than 80% of the Society's publisher and writer revenues have now been received, including the authorizations of all members of the Board of Directors.

HERMAN FINKELSTEIN

Sworn to before me this
21st day of December, 1961.

HENRY HOROWITZ
Notary Public, State of New York
No. 03-0934300
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1962

Exhibit "A" Annexed to Affidavit of Herman Finkelstein

COlumbus 5-7464

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS
THIRTY ROCKEFELLER PLAZA
NEW YORK 20, N. Y.

[Emblem]

December 12, 1945
Number 4310

TO ALL MEMBERS:

Re: TELEVISION AGREEMENT

On October 1, 1945, we enclosed in Circular Letter No. 4271 a proposed amendment to your membership to include television.

Some of the members of the Society felt that the proposed amendment as drawn might modify rights as between writers and publishers independently of the provisions of this amendment, and independently of the grant made by writers and publishers to the Society.

In order not to prejudice the rights of either writers or publishers as between themselves, and to be certain that such rights are not affected in any way, the following modification in the proposed amendment was approved by the Board of Directors on November 27, 1945:

> "Nothing herein contained shall affect or modify any rights as between writers and publishers under existing agreements. At the expiration of the term

of this agreement, namely, December 31, 1948, this agreement shall be cancelled as of said date with the same force and effect as if this agreement had not been executed. No reference to this agreement shall be made in support of or against any interpretation of existing contracts between writers and publishers in respect of any specific composition."

It is believed that this modification will result in receiving the consents of a number of members who have withheld sending in their agreements, pending a clarification of this matter.

We are happy to report that, up to the present time, the amendments signed by writers represent 67.95 per cent (67.95%) of the total amount of the Society's distribution of domestic royalties during the calendar year 1944 to writer-members, and that the amendments signed by publisher-members to date represent 60.08 per cent (60.08%) of such distribution to publisher-members during that year.

When the total number of consents of writers and publishers each aggregates eighty per cent (80%) in each respective group, the television amendment will be declared in effect.

If you have not sent in your amendment, please do so at once.

The modification quoted above will be deemed a part of the television amendment signed by all members, whether their amendment was signed and sent in to the Society heretofore or shall be signed and sent in to the Society hereafter.

Exhibit "A" Annexed to Affidavit of Herman Finkelstein

Again, I wish to urge you to send your amendment in at once if you have not already done so.

Cordially yours,

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

DEEMS TAYLOR
President

Exhibit "B" Annexed to Affidavit of Herman Finkelstein

PLaza 7-2700

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS
THIRTY ROCKEFELLER PLAZA
NEW YORK 20, N. Y.
[Emblem]

#4772
October 8th, 1948.

TO ALL MEMBERS:

Enclosed please find two copies of the new television agreement with the Society, terminating December 31st, 1950.

This replaces the present agreement which expires December 31st of this year. It was unanimously approved and signed by the following members of our board of directors who were present at a special meeting called for that purpose:

Writers	*Publishers* (Signing for themselves, their subsidiaries and affiliates)
Stanley Adams	
Fred E. Ahlert	
Gene Buck	Louis Bernstein
Paul Cunningham	Irving Caesar
Oscar Hammerstein II	Frank H. Connor
Otto A. Harbach	Max Dreyfus
Ray Henderson	Donald Gray
John Tasker Howard	Jack Mills
A. Walter Kramer	Jack Robbins
Edgar Leslie	Lester Sahtly
George W. Meyer	Herman Starr

Exhibit "B" Annexed to Affidavit of Herman Finkelstein

Our present license agreements with the telecasters provides for a gratuitous license subject to a thirty-day cancellation notice on our part. The progress of commercial television within the past year can only be described in terms of "leaps and bounds" and the telecasters are now desirous of entering into license agreements for a fixed period.

In the interest of good customer and public relations, it has become imperative for us to arrive at a license agreement with them, commensurate with our contribution, as quickly as possible.

You will note that the following resolution explains the terms under which the agreement between the Society and its members is to become effective:

> "RESOLVED, that the Society promptly send to all members a proposed television agreement in the form hereto annexed for execution by such members; and it was
>
> "FURTHER RESOLVED that the President hold in escrow all such agreements signed by members of the Society until the writer-members who have signed and delivered such agreements and the publisher-members who have signed and delivered such agreements represent eighty percent (80%) of the total amount of the Society's distribution of domestic royalties during the calendar year 1947 to writer-members and publisher-members respectively, at which time such agreements shall become in full force and effect as to all members who shall have signed and delivered the same."

Exhibit "B" Annexed to Affidavit of Herman Finkelstein

It is, therefore, extremely urgent that you sign the two enclosed copies and mail both of them back to us in the enclosed stamped envelope, at your earliest convenience.

Thanking you for your kind attention,

Cordially yours,

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS,

/s/ FRED E. AHLERT,
President.

Enclosures
FEA:SR

Exhibit "C" Annexed to Affidavit of Herman Finkelstein

Network effective date letter.

October 17, 1949.

American Society of Composers,
Authors and Publishers
30 Rockefeller Plaza
New York, N. Y.

Dear Sirs:

Simultaneously with the delivery of this letter, we are delivering to Hon. Robert P. Patterson in accordance with the provisions hereof two fully executed copies of each of the following license agreements:

All of such license agreements (hereinafter referred to as the license agreements) have been executed as of January 1, 1949.

As you do not now have authority to enter into such license agreements, it is hereby agreed between us as follows:

1. Attached hereto as Exhibit "A" is the form of television recording letter hereinafter referred to.

2. The license agreements shall become effective on such date as you shall deliver to us

(a) written notice that you have received such rights as are necessary to permit you to license, under the license

agreements, to the extent therein provided and for the full terms thereof, the performance of musical compositions copyrighted, composed or written by your members, from at least each of the following majorities of the respective member groups indicated:

(i) your publisher-members who in the aggregate received at least 85%, of the amount of your total distribution of domestic royalties during the calendar year 1948 to publisher-members (provided the publisher-members constituting this percentage shall include all of your publisher-members who are on the date hereof represented on your Board of Directors or who are affiliated with a publisher-member represented on said Board, and who have executed your television agreement which you submitted to all members with your letter dated October 8, 1948); and

(ii) your writer-members who in the aggregate received at least 85% of the amount of your total distribution of domestic royalties during the calendar year 1948 to writer-members; and

(iii) your publisher-members and writer-members who in the aggregate received at least 85%, of your aggregate total distribution of domestic royalties during the calendar year 1948, to both publisher-members and writer-members; and

(b) A letter, in the form attached as Exhibit "A", executed by each of your publisher-members who shall have granted you the rights referred to in sub-paragraph (a) of this Paragraph 2.

There shall be attached to the written notice provided for in sub-paragraph (a) of this Paragraph 2 a list of the members from whom you receive such rights, and said list

shall be attached to the license agreements as Schedule "A" thereof, upon the effective date of the license agreements.

3. (a) Within thirty (30) days after the execution of this letter agreement, we shall compute the entire amount which would be payable to you pursuant to the license agreements for the period from January 1, 1949 to September 30, 1949, inclusive, had they been effective during such period, and we shall pay such amount as follows:

(i) 75% of such amount shall be paid directly to you;

(ii) 25% of such amount shall be deposited by us in escrow with Hon. Robert P. Patterson.

(b) During the period commencing October 1, 1949, we shall pay the amounts which would be payable under the licensing agreements if they were effective during such period, as follows:

(i) 75% of such amounts shall be paid directly to you;

(ii) 25% of such amounts shall be deposited by us in escrow with Hon. Robert P. Patterson.

(c) It is agreed that Hon. Robert P. Patterson shall pay to you all amounts and deliver to you and to us one of the executed copies of each license agreement deposited in escrow pursuant to this agreement upon the date on which the license agreements shall become effective or, if this agreement shall be terminated as provided in Paragraph 4 of this agreement, he shall pay to us the amount deposited in escrow upon the effective date of such termination, and

Exhibit "C" Annexed to Affidavit of Hyman Fink

plainly mark all such copies of such license agreement and mail and return one copy of each of such documents to you and to file the other in our respective files.

4. (a) In the event that the conditions specified in paragraph 2 of this agreement shall not have been fulfilled on or before December 31, 1949, either you or we may terminate this agreement at any time thereafter, provided that the party exercising such right of termination shall notify the other thereof in writing and shall specify in such notice the effective date of such termination, which shall not be less than 30 days subsequent to the date on which such notice is received by such other party. In the event that both parties shall exercise such right of termination, the earliest effective date of termination specified in any such notice shall be the effective date of termination of this agreement. The indemnity provisions of the Paramount television licenses, to which reference is made in paragraph 3 of this agreement, and our obligations to make the payments provided for in said paragraph 3 and in subparagraph (a) of this paragraph 4 of this agreement shall not be affected by any termination of this agreement made during the period preceding the effective date of such termination concerned. In the event that the conditions specified in paragraph 2 of this agreement shall be fulfilled during the period subsequent to the giving of such notice and prior to the effective date specified therein, such notice of termination shall be of no force or effect.

(b) In the event that this agreement shall be terminated as provided for herein prior to the fulfillment of the

tions specified in Paragraph 2 of this agreement, the license agreements shall be without effect for any purposes whatsoever and shall be deemed null and void.

5. You hereby agree that the temporary television licenses granted by you to us on December 1, 1948, which were originally for sixty (60) days commencing as of January 1, 1949, and which were extended from time to time to October 14, 1949, are hereby extended to either (i) the date when the license agreements become effective pursuant to Paragraph 2 of this agreement, or (ii) the effective date of termination of this agreement pursuant to Paragraph 4 of this agreement, as the case may be. You further agree that Exhibit "B" attached hereto is hereby made a part of said temporary television licenses and that said temporary television licenses are hereby supplemented effective as of January 1, 1949, by considering to be incorporated therein the provisions of Paragraph 9 of the license agreements referred to on Page 1 hereof, with the understanding that the term referred to therein is the term of such temporary licenses in place of the term specified in such license agreements, and that references to Schedule "A" therein shall be deemed to refer to Exhibit "B" attached hereto.

6. In light of the impracticability of our furnishing further reports to you under Paragraph 3 of such license agreements for the period prior to the date hereof you have agreed that the reports heretofore made by us to you as to the performances made during such period shall be deemed a full compliance with the provisions of such Paragraph 3 with respect thereto.

Exhibit "3" Annexed to Affidavit of Herman Fi

"Our signature at the foot hereof, together wi
signature underneath the words "ACCEPTED AND
To", will constitute this an agreement between us.

Very truly yours,

.....

By .....

ACCEPTED AND AGREED TO:

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By .....

Exhibit "D" Annexed to Affidavit of Herman Finkelstein

Cable Address:
ASCAP, New York

MUrray Hill 8-8800

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS
575 MADISON AVENUE
NEW YORK 22, N. Y.

[Emblem]

May 1, 1953
No. 6349

TO ALL MEMBERS:

The present television agreement between the Society and its members expires at the end of this year.

There are enclosed two copies of an extension of that agreement for a period expiring December 31, 1957.

The following resolution explains the terms under which the enclosed extension agreement between the Society and its members is to become effective:

"RESOLVED that the Society promptly send to all members a proposed television agreement in the form hereto annexed for execution by such members, and it was

"FURTHER RESOLVED that the President hold in escrow all such agreements signed by members of the Society until the writer-members who have signed and delivered such agreements and the publisher

members who have signed and delivered such agreements represent eighty percent (80%) of the total amount of the Society's distribution of domestic royalties during the calendar year 1952 to writer members and publisher members respectively, at which time such agreements shall become in full force and effect as to all members who shall have signed and delivered the same."

Our Board of Directors recommends this extension to our membership.

After reading it carefully, please sign both copies and return them to us as soon as possible.

Sincerely yours,

S. STANLEY ADAMS
President

Exhibit "D" Annexed to Affidavit of Herman Finkelstein

American Society of Composers,
Authors and Publishers
575 Madison Avenue
New York 22, N. Y.

Gentlemen:

With respect to the existing Television Performing Rights Agreement entered into between you and the undersigned for a term ending December 31, 1953, you and the undersigned hereby agree to extend the same and all the terms, conditions and provisions thereof for a further period of four (4) years, so that the same shall expire on the 31st day of December, 1957, instead of on the 31st day of December, 1953.

Your signature and seal at the foot hereof, underneath the word "ACCEPTED", together with the signature of the undersigned at the foot hereof, will make this a valid, binding and enforceable agreement between us.

Sincerely yours,

..... (L.S.)

ACCEPTED:

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By .....

(Seal)

Exhibit "D" Annexed to Affidavit of Herman Finkelstein

American Society of Composers,
Authors and Publishers
575 Madison Avenue
New York 22, N. Y.

Gentlemen:

With respect to the existing Television Performing Rights Agreement entered into between you and the undersigned for a term ending December 31, 1953, you and the undersigned hereby agree to extend the same and all the terms, conditions and provisions thereof for a further period of four (4) years, so that the same shall expire on the 31st day of December, 1957, instead of on the 31st day of December, 1953.

Your signature and seal at the foot hereof, underneath the word "ACCEPTED", together with the signature of the undersigned at the foot hereof, will make this a valid, binding and enforceable agreement between us.

Sincerely yours,

..... (L.S.)

ACCEPTED:

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By .....

(Seal)

Exhibit "E" Annexed to Affidavit of Herman Finkelstein

Cable Address:
ASCAP, New York

MUrray Hill 8-8800

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS
575 MADISON AVENUE
NEW YORK 22, N. Y.

[Emblem]

Nov. 1, 1956
No. 6882

TO ALL MEMBERS:

The present television agreement between the Society and its members expires on December 31, 1957.

There are enclosed two copies of an extension of that agreement for a period expiring December 31, 1961.

The following resolution explains the terms under which the enclosed extension agreement between the Society and its members is to become effective:

"RESOLVED that the Society promptly send to all members a proposed television agreement in the form hereto annexed for execution by such members; and it was

"FURTHER RESOLVED that the President hold in escrow all such agreements signed by members of the Society until the writer-members who have signed and

delivered such agreements and the publisher-members who have signed and delivered such agreements represent eighty percent (80%) of the total amount of the Society's distribution of domestic royalties during the calendar year 1955 to writer-members and publisher-members respectively, at which time such agreements shall become in full force and effect as to all members who shall have signed and delivered the same."

Our Board of Directors recommends this extension to our membership.

After reading it carefully, please sign both copies and return them to us as soon as possible in the enclosed envelope.

Sincerely yours,

/s/ PAUL CUNNINGHAM
President

PC:fj

Exhibit "F" Annexed to Affidavit of Herman Finkelstein

Cable Address:
ASCAP, New York

MUrray Hill 8-8800

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS
575 MADISON AVENUE
NEW YORK 22, N. Y.

STANLEY ADAMS
President

August 4, 1961
No. 7756

TO ALL MEMBERS:

The present television agreement between the Society and its members expires on December 31, 1961.

There are enclosed two copies of an extension of that agreement for a period expiring December 31, 1966.

The following resolution explains the terms under which the enclosed extension agreement between the Society and its members is to become effective:

"RESOLVED that the Society send to all members a proposed television agreement in the form hereto annexed for execution by such members; and it was

"FURTHER RESOLVED that the President hold in escrow all such agreements signed by members of the Society until the writer-members who have signed and delivered such agreements and the publisher-

members who have signed and delivered such agreements represent eighty percent (80%) of the total amount of the Society's distribution of domestic royalties during the preceding calendar year to writer-members and publisher-members respectively, at which time such agreements shall become in full force and effect as to all members who shall have signed and delivered the same."

Our Board of Directors recommends this extension to our membership.

After reading it carefully, please sign both copies and return them to us as soon as possible in the enclosed envelope.

Sincerely yours,

/s/ STANLEY ADAMS
President

SA:fj
encs.

Office Supreme Court, U.S.
FILED
DEC 29 1962
JOHN F. DAVIS, CLERK

No. 592

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

SHENANDOAH VALLEY BROADCASTING, INC., ET AL.,

Appellants,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL OR TO AFFIRM

RALSTONE R. IRVINE
WALTER R. MANSFIELD
2 Wall Street
New York 5, New York

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL OR TO AFFIRM

Appellants submit this brief in opposition to the motion made by appellee ("ASCAP") to dismiss the within appeal for lack of jurisdiction or, in the alternative, to affirm the judgment of the District Court without further argument.

POINT I

Under the Expediting Act an appeal from a determination by the District Court under the ASCAP antitrust consent decree can only be taken to this Court.

Section 2 of the Expediting Act requires that an appeal be taken directly to the Supreme Court (i) "in every court action brought in any district court of the United States under [the antitrust laws]", (ii) "wherein the United States is complainant" and (iii) where the appeal is "from the final judgment of the district court."

All of these conditions are met here. The Amended Final Judgment herein was entered on March 14, 1950 as a final decree in an action brought by the United States against ASCAP under the Sherman Act. Section IX(A) of the decree provides that ASCAP shall upon the receipt of an application for a music license advise the applicant of the fee which it deems reasonable for the license requested, and that in the event the parties cannot agree "the applicant therefore may forthwith apply to this Court for the determination of a reasonable fee" (Appendix, p. 17a). By making an application to the District Court under Section IX of the decree appellants became parties to that decree to the extent and for limited purpose of enforcing specific obligations imposed on ASCAP by its provisions, and any appeal from a final judgment in such a proceeding must be taken to this Court.

This precise point was ruled upon by this Court in *Missouri-Kansas Pipe Line Co. v. United States*, 312 U. S. 502. In that case the Government brought an antitrust action against certain companies and individuals, charging them with conspiring to suppress a competitor, the Pan-

handle Eastern Pipe Line Company ("Panhandle Eastern"). Panhandle Eastern was not joined as a defendant. The action terminated in a consent decree. Sections IV and V of the decree placed certain obligations on the defendants to prevent them from restricting the competitive activities of Panhandle Eastern, and permitted Panhandle Eastern to apply to a district court to enforce these prohibitions.

Subsequently, when the consent decree was reopened and the defendants sought certain modifications, the Missouri-Kansas Pipe Line Company ("Missouri-Kansas"), a large shareholder in Panhandle Eastern, sought to intervene to protect Panhandle Eastern's interests. The District Court denied intervention.

On appeal, this Court reversed. Brushing aside the defendants' contentions that Rule 24(a) of the Federal Rules of Civil Procedure gave Missouri-Kansas no right to intervene, this Court (per Justice Frankfurter) pointed out that:

> "All of these arguments misconceive the basis of the right now asserted. The foundation is the consent decree. We are not here dealing with a conventional form of intervention, whereby an appeal is made to the court's good sense to allow persons having a common interest with the formal parties to enforce the common interest with their individual emphasis . . .
>
> "To enforce the rights conferred by Section IV was the purpose of the petition. Therefore, the codification of general doctrines of intervention contained in Rule 24(a) does not touch our problem. And since the protection afforded Panhandle by Section IV of

> the decree could only be secured by the remedy designed by Section V, to wit, active participation in the suit, the denial of that protection is a definitive adjudication, and so appealable." (312 U. S. at pp. 506, 508)*

The situation here presents a stronger case than *Missouri-Kansas*. In *Missouri-Kansas* the moving party was not Panhandle Eastern, but its shareholder Missouri-Kansas, which asserted Panhandle Eastern's rights derivatively. Here it is undisputed that applicants themselves are "music users" and within the class specified by Section IX of the ASCAP consent decree. Furthermore, Section IX of the ASCAP decree not only grants appellants the right to apply to the District Court for a determination of reasonable fees for the license requested by appellants but further provides that by making such an application appellants subject themselves to the rate-making power of that court. Under Section IX(b), the District Court is empowered to fix an interim fee, and if it does so "the applicant shall accept a license providing for the payment of a fee at such interim rate" (Appendix, p. 17a). Here the District Court did in fact enter a preliminary order fixing an interim fee and ordering the applicants to make such fee payments to ASCAP (R. 548-549).

Section 2 of the Expediting Act is not limited to appeals from a "final judgment" on the issues raised in the underlying complaint, or to ancillary proceedings under an anti-

---

* A prior appeal to the Court of Appeals by Missouri-Kansas had been dismissed for lack of jurisdiction for the reason that under the Expediting Act appellate jurisdiction was vested exclusively in the Supreme Court. 108 F. 2d 614 (3rd Cir.), certiorari denied, 309 U. S. 687.

trust decree in which the United States is the "complainant." Thus in *Terminal Railroad Assoc. v. United States*, 266 U. S. 17, where one group of defendants brought contempt proceedings against another group of defendants for alleged violations of an antitrust decree, this Court held that Section 2 of the Expediting Act controlled, and that the only appeal from the contempt order lay with the Supreme Court. In *United States v. California Cooperative Canneries*, 279 U. S. 553, where a company not a party to a consent decree sought to intervene and stay that decree, this Court held that an appeal by the intervenor, like an appeal by one of the original parties, must be taken directly to the Supreme Court (279 U. S. at 559).

These decisions confirm the general rule that where a specified federal trial or appellate court is invested with jurisdiction in a certain cause, whether by constitutional or statutory authority, then that court normally also has jurisdiction over ancillary or supplemental proceedings pendent thereto. *United States v. California Cooperative Canneries*, 279 U. S. 553 at p. 559; *St. Louis, Iron Mountain & Southern Railway Co. v. J. F. Hasty & Sons*, 255 U. S. 252 at p. 254; *Arkadelphia Milling Co. v. St. Louis Southwestern Railway Co.*, 249 U. S. 134 at pp. 140-142.

No basis exists for ASCAP's contention that appeals under Section 2 of the Expediting Act are limited to cases of "great public interest." Section 2 of the Act does not require a finding of "great public interest" for appellate jurisdiction to be properly in this Court. *See, e.g., Sun Fox Publishing Co. v. United States*, 366 U. S. 683. By contrast, Section 1 of the Expediting Act, 32 Stat. 823 (1903) as amended; 15 U. S. C. 28, which governs the expedition of antitrust actions in the trial courts, does re-

quire that before its provisions are applicable the Attorney General file a certificate that the case is of "general public importance." No such requirement is contained in Section 2 of the Act governing appeals to this Court. In any event, for the reasons stated in our Jurisdictional Statement, the questions presented here are of substantial public importance.

ASCAP's contention that this Court should reject appeals in proceedings of this nature in order to avoid an exhaustive review of factual determinations ignores the fact that review of a final determination in a rate-fixing proceeding is subject to the limitations prescribed by Rule 52(a) of the Federal Rules of Civil Procedure. Compare *Timken Roller Bearing Co. v. United States*, 341 U. S. 593 at pp. 596-97; *United States v. Yellow Cab Co.*, 338 U. S. 338, 340-42.

POINT II

ASCAP's motion to affirm should be denied.

The proceeding below presented triable issues of fact and should not have been adjudicated by the District Court without granting appellants a hearing for the taking of evidence

ASCAP's attempted justification of the District Court's decision furnishes a telling demonstration that the District Court erred in refusing to hold a hearing for the taking of evidence. All of the arguments advanced by ASCAP either rest on the proof of facts asserted in ASCAP's offer of proof or are based on assumptions which are demolished by the facts that appellants offered to prove.

ASCAP contends that the licenses sought by appellants are inconsistent with the terms of the 1950 decree in that

they would destroy the "option" that independent film producers have to "clear music at the source" under Sections V(B) and (C) of the 1950 decree (Appellee's Brief, pp. 5 and 14).

This contention, which repeats almost word-for-word portions of ASCAP's offer of proof (R. 1027), could not be seriously maintained before this Court if the District Court had considered the evidence offered by appellants. Appellants' proof shows that existing agreements between ASCAP's members and film producers, by requiring film producers to assign all music performance rights to ASCAP for licensing to broadcasters, effectively destroy any "option" on the part of the film producers to clear music at the source (Appendix, pp. 61a-63a). Moreover, Section V(A) of the 1950 decree offers the same "option" to "clear music at the source" to television networks that Section V(B) and (C) offers to film producers. Yet, as appellants are prepared to prove, all of ASCAP's existing local television licenses exclude network programs, leaving television networks no real choice but to clear network programs at the source (Appendix, p. 67a). Thus according to the argument now advanced by ASCAP, the existing local station licenses have the same alleged infirmity as appellants' proposed license.

ASCAP contends that under the 1950 decree it is not obligated to issue "blanket" licenses, but only "per program" licenses (Appellee's Brief, p. 17). Yet in the past, and before the District Court, ASCAP recognized its legal obligation under the decree to offer both "per program" and "blanket" licenses to broadcasters (Appendix, pp. 66a-72a). That evidence should have been considered by

the District Court. Compare *United States* v. *Atlantic Refining Co.*, 360 U. S. 19 at pp. 22-23.

Nothing in the record supports the District Court's finding that the licenses sought by appellants are not the type of "blanket" or "per program" licenses specified in the decree (Appendix, p. 1a). Nevertheless, ASCAP tries to defend this ruling by asserting that Section VII(A) of the decree refers only to licenses "for which the fee is based on revenues from *all* programs" (Appellee's Brief, p. 18), and that Section VII (B) refers only to licenses for which the fee is based on a station's revenues or card rates for each program containing ASCAP music "*whether or not the program consists of pre-recorded material*" (Id., p. 14).

These sections of the decree do not contain any such conditions. Nothing in Section VII requires a "blanket" or "per program" license to cover all of a broadcaster's programs. This Section is not concerned with the scope or number of programs covered by a license. It is limited to prescribing alternative methods of determining the fee due ASCAP for any group of programs that may become the subject of a license. Section VI(A) refers to a license the fee for which "is based upon a percentage of the income received by the licensee from programs which include no compositions in the ASCAP repertory", as distinguished from the "per program" fee basis prescribed by Section VII(B) (Appendix, p. 15a). There is no requirement in Section VII(B) that "per program" licenses cover programs consisting of pre-recorded material as well as locally originated material (Appendix, pp. 15a-16a).

The only interpretation of Sections VII(A) and (B) consistent with ASCAP's existing licenses is the one ad-

vanced by appellants, i.e., that the fee for a "blanket" license is based on revenues derived from all programs covered by the license, including programs not using ASCAP music, whereas the fee for a "per program" license is limited to revenues derived from programs covered by the license which actually use ASCAP music. If, as ASCAP now contends, Sections VIII(A) and (B) contemplated only licenses covering all of a broadcaster's programs, then ASCAP's existing local station "blanket" and "per program" licenses would not be "blanket" and "per program" licenses within the meaning of the decree since they specifically exclude network and certain other types of programs from their coverage (Appendix, p. 67a).

Appellants do not ask this Court to depart from the provisions of the 1950 decree

Appellants' position in this case is in no way inconsistent with this Court's rulings in *Hughes* v. *United States*, 342 U. S. 353, and *United States* v. *Atlantic Refining Co.*, 360 U. S. 19. In these cases this Court refused to adopt interpretations of consent decrees which were contrary to the specific terms of the decrees themselves. Here the posture of the parties is exactly the converse. On its face the ASCAP decree is clear: Section IX requires ASCAP to quote a fee "for the license requested" by a music user. It is ASCAP that seeks to escape the plain import of this language by adverting to the difficulties that might arise from a literal reading of this language (Appellee's Brief, p. 13). Appellants rely on the historical background of the decree not as a basis for departure from its terms but in order to demonstrate that Section IX means precisely what it says, and should not be construed to impose a lesser obligation on ASCAP.

The interpretation of the decree advanced by appellants would not, as ASCAP claims, force ASCAP to issue thousands of different types of licenses each differing in its terms (Appellee's Brief, p. 13). Appellants do not assert that they are entitled to dictate the terms of their license. What appellants claim they are entitled to do is to specify the class of programs for which they want a license. The precise terms of the license are properly left to negotiation with ASCAP, subject to the rate-fixing power of the Court under Section IX of the decree.

There is no basis in the record for the District Court's findings of fact

ASCAP cites an affidavit submitted by ASCAP's counsel in connection with a motion for preliminary injunctive relief (Appellee's Brief, pp. A-1-A-31) in an effort to justify the District Court's actions in (1) making factual findings after rejecting both parties' offers of proof and (2) refusing to hold a hearing for the taking of evidence (Appendix, p. 33a). This attempted justification is without merit.

In its opinion of September 14, 1962 dismissing appellants' petition, the District Court purported to find that the license sought by appellants

> "is a radically different license from that under which petitioners have been operating under the decree for the past twelve years." (Appendix, p. 1a)

that

> "The type of license sought is neither the blanket nor per program license described in the judgment." (Appendix, p. 1a)

and that

> "Local and network blanket television licensing agreements were made in 1949, 1954 and 1958; sub-

stantially the same provisions were contained in each agreement." (Appendix, p. 58a)

None of these findings could have been based on the affidavit cited by ASCAP. That affidavit was submitted in connection with a motion for preliminary injunctive relief, and for the purpose of showing that the need for such relief had been "rendered moot" by reason of ASCAP's receipt of certain necessary authorizations from its members (Appellee's Brief, p. A-2). The affidavit makes no claim that the existing licenses were negotiated prior to entry of the 1950 decree. On the contrary, the affidavit notes that in 1949 television broadcasters rejected the type of license then offered by ASCAP (Appellee's Brief, p. A-6). While the affidavit states that the television networks (as distinct from television broadcasters) agreed upon a certain "form of license" in 1949, the terms of this license are neither set out nor discussed.

It would in any event have been error for the District Court to base findings made in connection with a final judgment on statements appearing in an affidavit submitted in opposition to a motion for preliminary injunctive relief. *Addrac v. Redfield*, 12 Blatchf. 467, 1 Fed. Cas. No. 376 (C. C. N. D. N. Y.), *affirmed*, 98 U. S. 225; *Mesabi Iron Co. v. Reserve Mining Co.*, 270 F. 2d 567 (8th Cir.); *Hunter v. Atchison T. & S. F. Ry. Co.*, 188 F. 2d 294 (7th Cir.), at pp. 298-299, *certiorari denied*, 342 U. S. 819; *Brown v. Quinlan*, 138 F. 2d 228 (7th Cir.). As the Court of Appeals for the Seventh Circuit pointed out in *Brown v. Quinlan*, *supra*:

> "In entering its order disposing of the application for temporary injunction, the District Court proceeded to dismiss the complaint without any hearing upon the merits. We assume that the court

indulged the presumption that the evidence would be the same upon final hearing. Such an assumption was unjustified, for the parties had not stipulated that fact; nor had defendant waived its right to present additional evidence upon final hearing on the merits. Consequently that court could not properly thus finally dispose of the litigated issues." (138 F. 2d at p. 229)

This rule is especially applicable here since the affidavit in question was submitted after the Court advised the parties that it would grant appellants' motion to the extent of maintaining the status quo, and ASCAP's counsel consented to the entry of such an order (R. 176, 223, 238). Under the circumstances, there was no reason for appellants to controvert matters in the affidavit collateral to the issues then before the Court. This was recognized by the District Court which, in granting preliminary relief, pointed out that

> "What the terms of that renewal license should be is a matter which must await judicial decision *rendered only after a full hearing*, and this does not lie with the interim injunctive relief sought." (R. 546)

ASCAP also suggests, without elaboration (and without having designated any portion of the pertinent proceeding for inclusion in this record on appeal), that the District Court could have made its factual findings on the basis of judicial notice of the *Voice of Alabama* case, a rate proceeding initiated by television [illegible] 1951 (Appellees' Brief, p. 4, n. 2). Far [illegible] the District Court's findings, the record in the *Alabama* proceeding (a copy of the petition is set out in an appendix

annexed to this brief) shows that television broadcasters were not able to reach agreement with ASCAP prior to the entry of the 1950 consent decree and brought the *Town of Alabama* proceedings for the very purpose of obtaining a judicial resolution of ASCAP's obligations under the 1950 decree.

CONCLUSION

Appellee's motion to dismiss the appeal or to affirm should be denied.

Respectfully submitted.

Ralston R. Irvin
Wayne R. Mansfield
2 Wall Street
New York 5, New York

Hoppin Ash Irvin & Mansfield
2 Wall Street
New York 5, New York

APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 13-95

UNITED STATES OF AMERICA,

Plaintiff,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ET AL.,

Defendants.

In the Matter of the Application of VOICE OF ALABAMA, INC. et al.,

Petitioners,

For the Determination of Reasonable License Fees.

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of VOICE OF ALABAMA, INC., et al., respectfully alleges:

1. The corporations (hereinafter referred to as the "petitioners") enumerated in Schedule A annexed to this

Omitted from this Appendix

petition are each corporations duly organized and existing under the laws of the respective states listed in Schedule A opposite the name of each corporation. Each petitioner operates a television broadcasting station or stations known by the respective call letters and situated in the respective city and state listed in Schedule A opposite the name of each petitioner, all pursuant to licenses from the Federal Communications Commission.

2. On March 14, 1950 this Court entered its Amended Final Judgment in the action entitled "United States of America, Plaintiff, v. American Society of Composers, Authors and Publishers, et al., Defendants", Civil Action No. 13-95 (hereinafter referred to as the "ASCAP Final Judgment"). This petition is filed for relief at the foot of the ASCAP Final Judgment.

3. Paragraph IX (A) of the ASCAP Final Judgment provides as follows:

> "Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such pro-

ceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Sub-section (B) hereof, and to the final order or judgment entered by this Court in such proceeding;"

4. Pursuant to Paragraph IX (A) of the ASCAP Final Judgment the petitioners made written applications to defendant American Society of Composers, Authors and Publishers (hereinafter referred to as defendant "ASCAP") for licenses for the right of public performance by their respective stations of the compositions in the ASCAP repertory. In addition, petitioner Allan B. DuMont Laboratories Inc. made an application for network licenses for the right of public performance of the compositions in the ASCAP repertory.

5. The parties have been unable to agree upon a reasonable fee for the licenses applied for. More than sixty days have elapsed from the date when such applications were received by ASCAP. The sixty day period of negotiations provided for in Paragraph IX (A) of the ASCAP Final Judgment has by agreement of the parties been extended from time to time; the last such extension expires on July 18, 1951.

Appendix

6. Paragraph IX (B) of the ASCAP Final Judgment provides as follows:

> "When an applicant has the right to perform any compositions in the ASCAP repertory pending the completion of any negotiations or proceedings provided for in Subsection (A) hereof, either the applicant or ASCAP may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. If the Court fixes such interim fee, ASCAP shall then issue and the applicant shall accept a license providing for the payment of a fee at such interim rate from the date of the filing of such application for an interim fee. If the applicant fails to accept such license or fails to pay the interim fee in accordance therewith, such failure shall be ground for the dismissal of his application. Where an interim license has been issued pursuant to this Subsection (B), the reasonable fee finally determined by this Court shall be retroactive to the date the applicant acquired the right to use any, some or all of the compositions in the ASCAP repertory pursuant to the provisions of this Section IX;"

7. Heretofore petitioners, except Birmingham Broadcasting Company, Inc. and Allan B. DuMont Laboratories Inc., entered into interim license agreements whereby ASCAP granted to said petitioners the right of public performance of the compositions in the ASCAP repertory for an interim period. Pursuant to such interim license agreements said petitioners have been paying and have tendered interim license fees to ASCAP for such grants.

WHEREFORE petitioners respectfully apply to this Court at the foot of the ASCAP Final Judgment (a) for a determination of a reasonable fee for the proposed licenses and (b) for the fixing of an interim fee for such licenses pending final determination of what constitutes a reasonable fee and (c) for such other and further relief as to the Court may seem just and proper.

Dated, New York, N. Y.
July 18, 1951

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By SAMUEL J. SILVERMAN
a Partner

Attorneys for Petitioners
Office & P. O. Address:
575 Madison Avenue
New York 22, N. Y.

Stuart Sprague,
of Counsel.

[Seal]

A TRUE COPY

Herbert A. Charlson, Clerk

By Elsie M. Eilen
DEPUTY CLERK